

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE PRESIDING

- - -

MS. J.P., ET AL.,)	
)	
PLAINTIFFS,)	
)	
VS.)	CV18-06081-JAK
)	
JEFFERSON B. SESSIONS, ET AL.,)	
)	
DEFENDANTS.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
THURSDAY, SEPTEMBER 20, 2018; 1:30 PM

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1 LOS ANGELES, CALIFORNIA; THURSDAY, SEPTEMBER 20, 2018

2 1:30 PM

3 - - - - -
4

5
6 THE COURT: GOOD AFTERNOON.

7 ITEM NO. 9, CV18-06081, MS. J.P., ET AL.

8 V. JEFFERSON B. SESSIONS, ET AL.

9 WOULD YOU STATE YOUR APPEARANCES, PLEASE,
10 STARTING WITH PLAINTIFF'S COUNSEL.

11 MR. ROSENBAUM: GOOD AFTERNOON, YOUR HONOR.

12 MARK ROSENBAUM ON BEHALF OF PLAINTIFFS.

13 MS. LALLY: GOOD AFTERNOON, YOUR HONOR. AMY
14 LALLY FROM SIDLEY AUSTIN ON BEHALF OF THE PLAINTIFFS,
15 ALONG WITH KEVIN FEE, BRIDGET JOHNSON AND LOGAN BROWN
16 FROM SIDLEY AUSTIN.

17 THERE ARE A NUMBER OF MATTERS ON CALENDAR
18 FOR TODAY. IF IT PLEASE THE COURT, MR. FEE WILL
19 HANDLE --

20 THE COURT: IF YOU COULD JUST INTRODUCE WHO IS
21 HERE, PLEASE, AND WE'LL GET TO OTHER MATTERS LATER.

22 MR. HADDAD: MARK HADDAD FOR THE PLAINTIFFS.

23 THE COURT: GOOD AFTERNOON.

24 MR. HEYSE: GOOD AFTERNOON, YOUR HONOR.

25 MICHAEL HEYSE FOR THE DEFENDANTS, HERE WITH MICHELLE

1 SLACK ALSO FROM THE DOJ.

2 THE COURT: GOOD AFTERNOON.

3 WELL, WE'RE HERE ON THE MOTION FOR
4 PRELIMINARY INJUNCTION AND THE MOTION FOR CLASS
5 CERTIFICATION.

6 I'VE REVIEWED YOUR FILINGS, AND I HAVE
7 SOME QUESTIONS.

8 WITH RESPECT TO THE -- WELL, THEY'RE
9 OVERLAPPING INASMUCH AS -- WELL, THEY OVERLAP SOMEWHAT.

10 ONE OF THE ARGUMENTS THAT THE DEFENDANTS
11 HAVE ADVANCED IS THE FIRST TO FILE RULE. AND I'D LIKE
12 TO HEAR FROM YOU ON THAT ISSUE INASMUCH AS THE MS. L.
13 MATTER IN THE SOUTHERN DISTRICT OF CALIFORNIA RAISED
14 THE ISSUES CONCERNING THE CONSTITUTIONALITY OF THE
15 POLICY OF SEPARATING PARENTS AND CHILDREN. AND THE
16 DETERMINATIONS THERE ARE, I KNOW, SUBJECT TO APPELLATE
17 REVIEW.

18 THE COMPLAINT IN THAT ACTION STATED, IN
19 TERMS OF THE RELIEF SOUGHT, "AND OTHER APPROPRIATE
20 RELIEF" OR WORDS TO THAT EFFECT.

21 SO I'M MINDFUL THAT THE ISSUE OF THE
22 FIRST TO FILE RULE, IT'S NOT AN ABSOLUTE RULE OR ONE
23 THAT IS NOT TO BE PART OF THE EXERCISE OF DISCRETION.
24 BUT I'D LIKE TO HEAR FROM YOU ON THIS, PARTICULARLY
25 INASMUCH AS BECAUSE AT LEAST TWO OF THE THREE NAMED

1 PLAINTIFFS HERE ARE MEMBERS OF THAT CLASS. AND ALL
2 THREE MAY BE. I CAN'T TELL FROM WHAT'S BEEN FILED.

3 NOW, I RECOGNIZE, AGAIN, THAT A PERSON
4 DOESN'T HAVE TO OPT OUT OF AN INJUNCTIVE RELIEF CLASS
5 ACTION. BUT IF THE SAME PERSONS ARE MEMBERS OF THE
6 CLASS, AND IF THE UNDERLYING -- AN UNDERLYING BASIS FOR
7 RELIEF IS THE RELIEF THAT WAS GRANTED IN THAT CLASS,
8 THEN I'D LIKE TO KNOW WHY TWO SEPARATE ACTIONS AND,
9 POTENTIALLY, TWO DIFFERENT PATHS OF APPELLATE REVIEW
10 WOULD BE NECESSARY BECAUSE, AS YOU BOTH KNOW, THERE IS
11 APPELLATE REVIEW NOW PENDING WITH RESPECT TO AT LEAST
12 CERTAIN ORDERS ENTERED IN THE MS. L. CLASS.

13 THE SECOND QUESTION THAT I HAVE ABOUT
14 WHICH I'D LIKE TO HEAR CONCERNS, NOT THE ISSUE OF
15 MENTAL HEALTH RELIEF, MEDICAL HEALTH RELIEF DURING THE
16 TIME A PERSON IS IN CUSTODY, BUT PROVIDING SUCH RELIEF
17 AFTER THE PERSON IS NO LONGER IN CUSTODY.

18 I KNOW YOU HAVE CITED CASES ON THIS
19 TOPIC, INCLUDING A CASE IN WHICH -- A PRESCRIPTION -- A
20 PERSON WHO WAS DISCHARGED FROM CUSTODY WAS DETERMINED
21 SHOULD HAVE SUFFICIENT PRESCRIPTION TO FACILITATE
22 TRANSITION TO NO LONGER BEING IN CUSTODY.

23 BUT I'D LIKE TO KNOW WHAT OTHER -- IF
24 THERE'S ANY OTHER BASIS FOR THE CONTENTION THAT,
25 FOLLOWING RELEASE FROM CUSTODY - AND I MIGHT AMEND THAT

1 TO SAY, "POTENTIALLY FOLLOWING RELEASE FROM CUSTODY AND
2 ANY CONTINUED SUPERVISION," - ORDERING AN INJUNCTION,
3 WHICH I THINK WOULD BE IN THE FORM OF AFFIRMATIVE
4 RELIEF, THAT WOULD REQUIRE ONGOING CARE IS CONSISTENT
5 WITH THE REQUIREMENTS.

6 OTHER ISSUES HAVE BEEN PRESENTED TO THE
7 EXTENT, FOR EXAMPLE, THAT THE CLASS CONSISTS, AS
8 PROPOSED, OF THOSE WHO HAVE BEEN RELEASED ARE THE --
9 WHICH INCLUDES THE CLASS REPRESENTATIVES, I BELIEVE.
10 ARE THEY SUITABLE REPRESENTATIVES, POTENTIALLY, FOR
11 THOSE WHO HAVE NOT BEEN RELEASED?

12 AND, SIMILARLY, THE MIRROR IMAGE OF THAT.
13 TO THE EXTENT THAT THE DEFENDANTS CONTEND ALL SUCH
14 PERSONS MAY HAVE BEEN RELEASED, DOES THAT REALLY CREATE
15 MOOTNESS WHERE THIS ISSUE COULD BE RENEWED AND EVADE
16 REVIEW BECAUSE CERTAIN PERSONS ARE DETAINED AND THEN
17 RELEASED.

18 SO THOSE ARE SOME OF THE MATTERS ON WHICH
19 I'D LIKE TO HEAR FROM YOU.

20 I'M MINDFUL THAT THE GOVERNMENT -- THAT
21 THE DEFENDANTS HAVE FILED AN EX PARTE APPLICATION TO
22 ADVANCE THE DATE ON A HEARING ON A MOTION TO DISMISS,
23 WHICH I'M DISINCLINED TO GRANT. THE ISSUES, I THINK,
24 AS TO THAT, I DON'T KNOW THAT THERE'S ANY URGENCY TO
25 THAT, INASMUCH AS THE ISSUES CONCERNING THE LIKELIHOOD

1 OF SUCCESS ON THE MERITS, WHICH HAVE BEEN FULLY BRIEFED
2 HERE, OVERLAP WITH THE MOTION TO DISMISS.

3 SO RECOGNIZING THAT A DETERMINATION ON A
4 MOTION FOR A PRELIMINARY INJUNCTION IS NOT FINAL AS TO
5 THE ISSUE OF LIKELIHOOD OF SUCCESS, BUT GIVEN THE
6 OVERLAP IN ARGUMENTS, I DON'T SEE THE EMERGENCY NEED TO
7 ACCELERATE THE HEARING ON THAT.

8 SO, MS. LALLY, WHO WILL BE ADDRESSING
9 THESE ISSUES FOR THE PLAINTIFFS?

10 MS. LALLY: THANK YOU, YOUR HONOR.

11 KEVIN FEE IS PREPARED TO TALK ABOUT THE
12 BACKGROUND OF THE CASE, THE PRELIMINARY INJUNCTION
13 MOTION, ALL THOSE ARGUMENTS THAT OVERLAP BETWEEN THE
14 P.I. AND THE CLASS CERT MOTION. THAT WOULD CERTAINLY
15 INCLUDE THE SECOND ISSUE YOU ASKED TO BE ADDRESSED.

16 AND LOGAN BROWN, AN ASSOCIATE FROM OUR
17 OFFICE, IS HERE TO TALK ABOUT THE PROCEDURES OF THE
18 CLASS CERTIFICATION MOTION.

19 I THINK I WOULD ASK TO START WITH
20 MR. FEE, IF WE MAY?

21 THE COURT: THANK YOU.

22 MR. FEE?

23 MR. FEE: YOUR HONOR, KEVIN FEE ON BEHALF OF
24 THE PLAINTIFFS.

25 MAY IT PLEASE THE COURT. THE SUPREME

1 COURT HAS HELD THAT THE DUE PROCESS CLAUSE OF THE FIFTH
2 AMENDMENT WAS INTENDED TO PREVENT THE GOVERNMENT FROM
3 ABUSING ITS POWER OR FROM EMPLOYING IT AS AN INSTRUMENT
4 OF OPPRESSION.

5 NOW, THE QUOTE THAT I JUST READ WAS FROM
6 DESHANEY VERSUS WINNEBAGO, YOUR HONOR. AND IT IS OFTEN
7 QUOTED IN THE LINE OF CASES THAT FOLLOWED IT. AND
8 THOSE CASES TEACH THAT, IN SOME INSTANCES, THE
9 GOVERNMENT CAN VIOLATE INDIVIDUAL'S RIGHTS EVEN
10 INDIRECTLY, SUCH AS IN THE CIRCUMSTANCE WHERE THEY FAIL
11 TO PROTECT PEOPLE FROM HARM THAT ARE UNDER THE
12 GOVERNMENT'S CARE, SUCH AS IN DETENTION OR IN INSTANCES
13 WHERE THEY FAIL TO PROTECT PEOPLE FROM HARM FROM EVEN
14 THIRD PARTIES IN INSTANCES WHERE THE GOVERNMENT HAS
15 CREATED A DANGER. SO THE SCOPE OF DUE PROCESS
16 PROTECTIONS IS SUFFICIENT TO EXTEND TO EVEN THOSE
17 CASES.

18 NOW, THIS CASE, HOWEVER, YOUR HONOR,
19 INVOLVES A MUCH MORE EGREGIOUS HARM THAN THOSE. AND
20 THAT'S BECAUSE THIS IS NOT A CASE OF A ONE-OFF INJURY
21 TO AN INDIVIDUAL BECAUSE OF AN ISOLATED GOVERNMENT
22 EMPLOYEE ASLEEP AT THE SWITCH. THIS IS A CASE OF A
23 GRIEVOUS HARM THAT WAS COMMITTED DIRECTLY, DIRECTLY BY
24 THE GOVERNMENT ITSELF, THROUGH A CONCERTED POLICY OF
25 PHYSICALLY SEPARATING FAMILIES AT OUR NATION'S BORDERS

1 AND INFLICTING SEVERE AND ONGOING TRAUMA THROUGH THAT
2 SEPARATION. AND THEN, IMPORTANTLY, ALLOWING THAT
3 TRAUMA TO PERSIST AND, IN SOME CASES, EVEN INTENSIFY BY
4 FAILING TO ADDRESS IT, EVEN AT A TIME THAT THE
5 GOVERNMENT WAS IN A POSITION TO DO SO.

6 SO THIS HARM WAS DIRECT. THIS HARM WAS
7 SYSTEMIC AND WIDE-RANGING. THIS WAS A POLICY OF HARM
8 RATHER THAN AN ISOLATED INCIDENT. IN THIS CASE, IT WAS
9 THE RULE, NOT THE EXCEPTION.

10 AND THE POLICY WAS IMPLEMENTED WITH FULL
11 KNOWLEDGE OF THE HARM THAT COULD BE CAUSED. THERE WAS
12 SWORN TESTIMONY BEFORE CONGRESS FROM REPRESENTATIVES OF
13 THE O.R.R. EXPLAINING THAT THEY HAD WARNED WHAT SHOULD
14 HAVE BEEN OBVIOUS, THAT THIS POLICY OF TEARING FAMILIES
15 APART AT THE BORDER WOULD BE HARMFUL TO PARENTS AND
16 CHILDREN ALIKE.

17 AND, IMPORTANTLY, THE POLICY OF HARM WAS
18 NOT INCIDENTAL. THE POLICY OF HARM WAS INTENTIONAL.
19 AGAIN, PUBLIC STATEMENTS FROM TOP ADMINISTRATION
20 OFFICIALS THAT AT LEAST PART OF THE PURPOSE OF THIS
21 POLICY WAS DETERRENCE, DETERRENCE. BY HARMING SOME
22 PEOPLE, YOU ENSURE THAT OTHERS WILL BE WARNED THAT THEY
23 MIGHT GET THE SAME TREATMENT FROM OUR GOVERNMENT. AND
24 IT WAS INFLICTED ON A CLASS OF ALREADY VULNERABLE
25 PEOPLE WHO WERE ARRIVING AT OUR NATION'S BORDER,

1 OFTENTIMES FLEEING DANGEROUS CONDITIONS IN THEIR HOME
2 COUNTRY AND LOOKING TO OUR COUNTRY FOR HELP.

3 NOW, IT DOESN'T TAKE SPECIALIZED
4 KNOWLEDGE OR TRAINING. IT DOESN'T TAKE A LAW DEGREE OR
5 A PSYCHOLOGY DEGREE TO SEE THAT PURPOSELY RIPPING
6 FAMILIES APART IS A TRAUMA, YOUR HONOR. IT'S A TRAUMA
7 OF THE HIGHEST ORDER. IT'S A TRAUMA NOT ONLY TO KIDS,
8 BUT TO PARENTS AND, FRANKLY, TO THE BONDS OF THE FAMILY
9 THEMSELVES.

10 THE MEDICAL AND MENTAL HEALTHCARE
11 COMMUNITIES HAVE CRIED OUT IN UNISON ON THIS. IT HAS
12 BEEN A MATTER OF PUBLIC KNOWLEDGE, AS I'M SURE YOUR
13 HONOR IS WELL AWARE. AND COURTS HAVE NOW MADE CLEAR
14 THAT IT IS NOW A LEGALLY-COGNIZABLE HARM AND A DUE
15 PROCESS VIOLATION TO SEPARATE THESE INDIVIDUALS AT THE
16 BORDER. AND, FRANKLY, THE QUESTION OF THIS TRAUMA,
17 THIS TRAUMA IS NOT THE SUBJECT OF SERIOUS DISPUTE AT
18 THIS POINT.

19 AND THANKS, IN PART, TO THE RULINGS OF
20 OTHER COURTS, THE REUNIFICATION, AT LEAST OF SOME OF
21 THESE FAMILIES, HAS BEGUN. AND THAT'S A GOOD FIRST
22 STEP, CERTAINLY. BUT THE HARM THAT THESE SEPARATIONS
23 HAVE CAUSED IS BY NO MEANS OVER. AND THE REUNIFICATION
24 OF THESE FAMILIES BY NO MEANS ADDRESSES THE HARM
25 COMPLETELY.

1 MANY FAMILIES REMAIN SEPARATED. FIRST OF
2 ALL, OVER 200 CHILDREN, I THINK, BY THE LAST COUNT
3 OFFERED BY THE GOVERNMENT DURING THE LAST HEARING IN
4 THE MS. L. CASE. AND THE EXPERIENCE OF THE
5 REUNIFICATIONS HAS BEEN A ROCKY ONE. THE LAST FEW
6 WEEKS HAVE BROUGHT HEART-WRENCHING STORIES IN THE MEDIA
7 ABOUT REUNIFICATIONS WHERE CHILDREN WERE SKEPTICAL OF
8 THEIR PARENTS, FEARFUL OF THEIR PARENTS, EVEN ANGRY AT
9 THEIR PARENTS, BLAMING THEM FOR THE SEPARATIONS, ALL OF
10 WHICH REALLY UNDERSCORES THE COMPLEXITY OF THE HARM
11 THAT WAS DONE HERE AND THE ONGOING NATURE OF THE TRAUMA
12 THAT WAS FIRST VISITED ON THESE FOLKS THROUGH THE
13 SEPARATION ITSELF.

14 AND, CRUCIALLY, THE FAMILIES REMAIN IN
15 DANGER, YOUR HONOR, THE DANGER THAT WAS INITIALLY
16 CAUSED BY THE SEPARATION. THEY REMAIN IN DANGER OF
17 INTENSIFYING HARM AS TIME GOES BY. WE SUBMITTED AN
18 EXTENSIVE RECORD BY TOP EXPERTS IN THE MENTAL HEALTH
19 FIELD THAT EXPLAIN IN DETAIL HOW IT IS THAT BOTH
20 PARENTS AND KIDS AND THE FAMILY UNIT ARE IN CONTINUING
21 DANGER AS LONG AS THIS TRAUMA IS LEFT UNTREATED. THEY
22 ARE AT EXTREMELY ELEVATED RISK OF FUTURE MENTAL
23 DISORDERS, OF PROFESSIONAL AND SOCIAL CONSEQUENCES WELL
24 INTO THEIR LIVES.

25 AND SO THE GOVERNMENT CREATED THIS RISK

1 NOT ONLY BY INFLICTING THE HARM TO BEGIN WITH; BUT,
2 AGAIN, BY ALLOWING THIS HARM TO PERSIST AND EVEN
3 INTENSIFY WHILE THESE PEOPLE WERE, AT TIMES, EVEN STILL
4 IN THE GOVERNMENT'S CUSTODY. AND THE GOVERNMENT WAS IN
5 A POSITION TO HELP.

6 AND SO THESE STAND AS TWO SEPARATE AND
7 INDEPENDENT CONSTITUTIONAL VIOLATIONS, YOUR HONOR, THE
8 INITIAL HARM CAUSED BY THE GOVERNMENT, THE SEPARATION,
9 AND THEN THE FAILURE TO ADDRESS THE SEPARATION CAUSED
10 BY THIS CONCERTED POLICY.

11 AND THIS CASE IS ABOUT RIGHTING THE
12 WRONGS OF THIS POLICY AND PUTTING INTO PLACE, FINALLY,
13 A PROCESS FOR MITIGATING AND STOPPING THE CATASTROPHIC
14 HARM THAT IT HAS BROUGHT.

15 SO UNDER THE LAW OF THIS CIRCUIT, AS YOU
16 KNOW, YOUR HONOR, PLAINTIFFS HAVE TO SHOW THAT, IN
17 ORDER TO BE ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF,
18 LIKELY SUCCESS ON THE MERITS, LIKELY IRREPARABLE HARM
19 ABSENT PRELIMINARY RELIEF, BALANCE OF EQUITIES AND
20 INJUNCTION BEING IN THE PUBLIC'S INTEREST. AND I WON'T
21 BORE YOUR HONOR UNLESS YOU WANT ME TO.

22 THE COURT: NO, BUT I'D LIKE TO HEAR THE
23 RESPONSES TO THE QUESTIONS I ASKED AT THE OUTSET.

24 MR. FEE: SURE.

25 SO THE RESPONSE -- THE SECOND QUESTION I

1 THINK FALLS RIGHT WITHIN WHAT WE'RE TALKING ABOUT HERE.
2 AND, THAT IS, THE NATURE OF THE DUE PROCESS VIOLATION
3 THAT WE ALLEGE AND THE BASIS FOR POST ATTENTION MEDICAL
4 RELIEF.

5 SO THERE ARE TWO BASES, YOUR HONOR, AS WE
6 HAVE PLED THEM. THERE'S THE BASIS UNDER THE SPECIAL
7 RELATIONSHIP TEST, ESSENTIALLY THE WAKEFIELD TEST, THAT
8 SAYS THAT, WHEN THERE'S A SPECIAL RELATIONSHIP BETWEEN
9 THE GOVERNMENT AND AN INDIVIDUAL, SUCH AS HERE WHERE
10 THEY'RE IN CUSTODY, THEY ARE REQUIRED TO HAVE A NUMBER
11 OF PROTECTIONS, INCLUDING ADEQUATE MEDICAL CARE.

12 THE COURT: WHILE IN CUSTODY.

13 MR. FEE: WHILE IN CUSTODY AND ALSO FOR A
14 PERIOD THEREAFTER.

15 THE COURT: WHAT CASE SAYS THAT BESIDES THE
16 PRESCRIPTION CASE AND THE DISTRICT COURT CASES THAT
17 HAVE INTERPRETED IT?

18 MR. FEE: WELL, THE WAKEFIELD CASE AND THEN
19 THERE'S ANOTHER CASE THAT WE CITED IN OUR BRIEF THAT
20 SUGGESTS THAT IT COULD EVEN GO AS FAR AS THREE MONTHS.
21 BUT IT HAS NOT BEEN LITIGATED ALL THAT MUCH. SO THE
22 NATURE OF THAT TRANSITIONAL PERIOD IS NOT CRYSTAL
23 CLEAR. SO THAT'S BASIS NUMBER ONE.

24 AND WHEN YOU LOOK AT THE RELIEF WE'RE
25 SEEKING, YOUR HONOR, IT IS IN SEVERAL STAGES. THE

1 FIRST STAGE BEING A SCREENING, THE SCREENING THAT ALL
2 THESE FOLKS SHOULD HAVE GOTTEN, A TRAUMA-INFORMED
3 SCREENING USING PROFESSIONAL -- ACCEPTED PROFESSIONAL
4 STANDARDS WITHIN THE COMMUNITY OF MENTAL HEALTH
5 PROVIDERS. THAT'S SOMETHING THAT EVERYONE SHOULD HAVE
6 GOTTEN WHILE THEY WERE IN CUSTODY. IT'S SOMETHING THAT
7 EVERYONE SHOULD GET WHO IS CURRENTLY IN CUSTODY, WHICH
8 IS PART OF OUR CLASS. IT'S SOMETHING THAT EVERYONE
9 SHOULD GET. NOW, THAT'S BASIS NUMBER ONE.

10 BASIS NUMBER TWO IS THE STATE CREATED
11 DANGER DOCTRINE. THE STATE CREATED DANGER DOCTRINE
12 HOLDS THAT THE GOVERNMENT IS RESPONSIBLE FOR PROTECTING
13 INDIVIDUALS FROM HARM WHERE THEY HAVE THE -- THE STATE
14 HAVE TAKEN AN ACTION THAT PUT THEM INTO A DANGEROUS
15 SITUATION THAT WOULD NOT HAVE EXISTED BUT FOR THE
16 GOVERNMENT'S ACTION.

17 NOW, CLEARLY, THE GOVERNMENT ACTION HERE
18 IS CRYSTAL CLEAR. THE GOVERNMENT ACTUALLY CAUSED THE
19 HARM, WHICH DISTINGUISHES THIS FROM A LOT OF STATE
20 CREATED DANGER CASES.

21 AND, IN FACT, THE PANILLA CASE, YOUR
22 HONOR, EXPLICITLY REJECTED THE NOTION THAT THE SCOPE OF
23 DUE PROCESS RIGHTS AVAILABLE UNDER THE STATE CREATED
24 DANGER DOCTRINE WAS LIMITED BY CUSTODIAL STATUS.

25 THE GOVERNMENT HAD ARGUED THAT, BECAUSE

1 THE INDIVIDUAL IN THAT CASE -- WHEN THE GOVERNMENT HAD
2 PLACED THEM IN A POSITION OF DANGER THROUGH AFFIRMATIVE
3 ACTS. THEY REJECTED THE NOTION THAT THE CARE THAT WAS
4 DUE TO THAT PERSON WAS NONEXISTENT BECAUSE THE PERSON
5 WAS NOT ACTUALLY IN POLICE CUSTODY. THEY MERELY MOVED
6 HIM FROM HIS -- I THINK IT WAS PORCH TO THE INSIDE OF
7 HIS HOME. SO HE WAS NOT IN POLICE CUSTODY. AND,
8 THEREFORE, THEY ARGUED THERE WAS NO RIGHT TO ADEQUATE
9 MEDICAL CARE. THERE WAS NO RIGHT TO ANY DUE PROCESS
10 VIOLATION OR DUE PROCESS PROTECTION. AND THE
11 GOVERNMENT REJECTED THAT. SO THE STATE CREATED DANGER
12 DOCTRINE IS NOT RESTRICTED BY SORT OF THE BOUNDS OF
13 THIS CONFINEMENT PARADIGM.

14 SO THE COMBINATION OF THOSE TWO GIVES
15 RISE TO THE DUE PROCESS RIGHTS THAT WE SEEK TO HAVE
16 VINDICATED HERE.

17 AND THERE HAVE BEEN CASES, YOUR HONOR,
18 THAT HAVE INVOLVED SORT OF THE INTERSECTION OF THE
19 THESE TWO RIGHTS. I WOULD POINT YOUR HONOR TO THE WANG
20 V. RENO CASE, WHICH INVOLVED SORT OF A DUAL VIOLATION
21 AS HERE INVOLVING THE GOVERNMENT BRINGING A CHINESE
22 NATIONAL TO TESTIFY IN A DRUG CONSPIRACY IN THE UNITED
23 STATES, FORCING HIM TO TESTIFY IN A WAY THAT EXPOSED
24 HIM TO HARM. AND THE GOVERNMENT GRANTED AN INJUNCTION
25 AFTER FINDING THAT HE WAS HARMED BOTH UNDER THE STATE

1 CREATED DANGER DOCTRINE AND THE DUE PROCESS RIGHTS THAT
2 ARISE OUT OF THE SPECIAL RELATIONSHIP THAT SPRINGS FROM
3 CUSTODIAL STATUS.

4 SO TO ANSWER YOUR QUESTION, YOUR HONOR,
5 AS TO WHAT WE THINK GIVES RISE TO THE RIGHT TO
6 POST-RELEASE RELIEF, IT'S THE COMBINATION OF THOSE TWO.

7 THE COURT: IS THERE A DISTINCTION BASED ON
8 THE NATURE OF THE RELEASE?

9 SOME HAVE BEEN RELEASED AND ARE ON BOND,
10 I BELIEVE; CORRECT?

11 ARE OTHERS RELEASED AND SUBJECT TO OTHER
12 RESTRICTIONS?

13 AND ARE SOME WHO HAVE BEEN RELEASED NO
14 LONGER IN THE UNITED STATES?

15 MR. FEE: I BELIEVE THAT IS TRUE, YOUR HONOR.

16 THE COURT: ALL THREE?

17 MR. FEE: ALL -- I BELIEVE THAT'S RIGHT, ALL
18 THREE.

19 AND I DON'T THINK THAT THERE'S A
20 DISTINCTION IN TERMS OF THE RELIEF THAT WE'RE SEEKING
21 BETWEEN THOSE DIFFERENT STATUSES.

22 THE COURT: WELL, IF THERE WERE A PERSON WHO
23 IS NO LONGER IN THE UNITED STATES WHO IS A CLASS
24 MEMBER, HOW WOULD THAT PERSON RECEIVE THE MEDICAL
25 TREATMENT?

1 MR. FEE: WELL -- AND I RECOGNIZE, YOUR HONOR,
2 THAT, IN THAT INSTANCE, THE PROVISION OF THE SERVICES
3 THAT INJUNCTION WOULD CALL FOR WOULD BE DIFFICULT.

4 BUT WHAT WE'RE SEEKING TODAY IS NOT SORT
5 OF A SOUP-TO-NUTS SOLUTION FOR HOW TO PROVIDE THIS.
6 WE'RE JUST ASKING FOR THE COURT TO ORDER THAT THE
7 GOVERNMENT COME INTO COMPLIANCE WITH ITS DUE PROCESS
8 RIGHTS.

9 AND IF -- THERE WILL CERTAINLY BE
10 INDIVIDUALS WHO ARE MORE DIFFICULT TO REACH THAN
11 OTHERS. THERE MAY BE INDIVIDUALS WHO CHOOSE NOT TO
12 RECEIVE SERVICES. BUT THE RIGHTS OF THE ENTIRE CLASS
13 ARE VERY MUCH THE SAME.

14 THE COURT: HOW WOULD YOU ANTICIPATE THAT --
15 WITH RESPECT TO THOSE WHO ARE STILL WITHIN THE UNITED
16 STATES, BUT WHO ARE NOT IN CUSTODY, WHERE WOULD THEY GO
17 FOR TREATMENT?

18 MR. FEE: AGAIN, THAT WOULD BE SOMETHING I
19 THINK THAT WE WOULD NEED TO WORK OUT THROUGH
20 DISCUSSIONS WITH THE GOVERNMENT AND THE COURT.

21 WE CAN ENVISION A NUMBER OF WORKABLE
22 SCENARIOS HERE INVOLVING SOME COMBINATION OF
23 GOVERNMENT-EMPLOYED THERAPISTS AND PRIVATE THERAPISTS.

24 WE'RE NOT, FRANKLY, IN A POSITION, NOR DO
25 WE THINK IT'S OUR BURDEN, TO COME UP WITH AN

1 AFFIRMATIVE LOGISTICAL PLAN FOR HOW TO DEAL --

2 THE COURT: WELL, TO THE EXTENT THAT THE
3 GOVERNMENT IS ARGUING THAT THE RELIEF SOUGHT IS MORE IN
4 LINE WITH FINANCIAL RELIEF AND/OR DAMAGES, IF I -- I
5 THINK I DO NEED TO UNDERSTAND THE NATURE OF THE RELIEF,
6 DON'T I?

7 BECAUSE IF, FOR EXAMPLE, YOUR POSITION IS
8 THAT, THOSE WHO ARE STILL WITHIN THE UNITED STATES, BUT
9 NOT IN CUSTODY, MIGHT HAVE A RIGHT TO GO TO A PRIVATE
10 THERAPIST, WHO IS GOING TO PAY THE THERAPIST?

11 MR. FEE: AGAIN, THAT WOULD BE -- YOU KNOW,
12 THOSE DETAILS, I THINK WOULD BE UP TO OUR DISCUSSIONS
13 WITH THE GOVERNMENT. IT MAY WELL BE THE GOVERNMENT.
14 BUT, YOUR HONOR, THIS IS --

15 THE COURT: WHY WOULDN'T -- IF THE -- SUPPOSE
16 THAT A PERSON IS RELEASED AND IS GIVEN A VOUCHER THAT
17 CAN BE USED FOR TREATMENT. OKAY? AND THROUGH THAT
18 VOUCHER, THE PERSON CAN GO AND GET TREATMENT FROM A
19 PRIVATE PARTY.

20 WHY IS THAT INJUNCTIVE RELIEF AT THAT
21 POINT AS OPPOSED TO FINANCIAL RELIEF ALLOWING MEDICAL
22 CARE?

23 MR. FEE: WELL, IN THE INSTANCE OF A VOUCHER,
24 I THINK WE WOULD HAVE A DIFFERENT CASE.

25 BUT IN THIS CASE, WE'RE NOT SEEKING

1 VOUCHERS. WE'RE SEEKING -- AND THE REASON WE'RE
2 SEEKING INJUNCTIVE RELIEF IS BECAUSE THIS IS A SYSTEMIC
3 POLICY THAT WE NEED TO HAVE HALTED.

4 THE COURT: BUT IF THE VOUCHER RAISES AN ISSUE
5 IN TERMS OF WHETHER INJUNCTIVE RELIEF WOULD BE
6 APPROPRIATE, THEN IS IT APPROPRIATE FOR ME TO -- CAN I
7 DETERMINE WHETHER INJUNCTIVE RELIEF IS APPROPRIATE WHEN
8 I DON'T KNOW HOW THE RELIEF WOULD BE PROVIDED?

9 AND IF THE RELIEF WERE THE SAME AS A
10 VOUCHER, WOULD THAT CREATE AN ISSUE?

11 MR. FEE: YOUR HONOR, I DON'T THINK IT WOULD
12 BE THE SAME AS A VOUCHER. THE RELIEF THAT WE'RE
13 SEEKING IS TO PROVIDE MEDICAL SERVICES THAT WERE
14 ALREADY DUE AND TO CONTINUE TO ADDRESS AND TO PREVENT
15 THE FUTURE VIOLATION OF FEDERAL LAW THROUGH THE
16 CONTINUED INFLECTION OF THIS TRAUMA. THAT'S ALL WE'RE
17 SEEKING. WE'RE SEEKING A BROAD ORDER THAT ALLOWS THE
18 GOVERNMENT TO THEN WORK TO BRING ITSELF INTO
19 COMPLIANCE.

20 JUST AS THE PLAINTIFFS IN THE MS. L. CASE
21 DID NOT WORK OUT THE DETAILS OF HOW TO FLY INDIVIDUALS
22 TO AND FROM DETENTION CENTERS, NOR ARE WE, FRANKLY, IN
23 THE POSITION TO DO SOMETHING SIMILAR IN THIS CASE.

24 WE RECOGNIZE THAT THERE ARE ISSUES AND
25 CONCERNS THAT THE GOVERNMENT IS LIKELY TO HAVE THAT WE

1 DON'T HAVE FULL VISIBILITY AND TRANSPARENCY INTO. AND
2 THAT'S WHY WE WOULD ENVISION SORT OF A PHASED APPROACH
3 TO THIS. WE COULD WORK WITH THE GOVERNMENT TO WORK OUT
4 A SOLUTION FOR THE DELIVERY OF THESE SERVICES.

5 BUT THIS IS AN EXTRAORDINARY HARM, YOUR
6 HONOR. THIS IS AN EXTRAORDINARY HARM THAT, FRANKLY,
7 BECAUSE OF THE NATURE OF THESE PEOPLE'S CUSTODIAL
8 STATUS AND THE FACT THAT THE GOVERNMENT HAS BEEN
9 RELEASING THEM BEFORE WE CAN GET TO HEARING, WILL
10 ESCAPE REVIEW UNLESS WE HAVE A SORT OF SYSTEMIC
11 APPROACH LIKE THE ONE WE'RE SEEKING HERE THROUGH OUR
12 INJUNCTION.

13 THE COURT: JUST A MINUTE.

14 IF A PERSON WHO IS IN CUSTODY SUSTAINED A
15 PHYSICAL INJURY WHILE IN CUSTODY AND STATED THAT THE
16 PHYSICAL INJURY WAS AS A RESULT OF BELOW STANDARD OF
17 CARE BY THE GOVERNMENT, AND THEN REACHED THE END OF
18 THAT PERSON'S SENTENCE, SO THE PERSON IS GOING TO BE
19 DISCHARGED WITHOUT HAVING FULLY RECOVERED FROM THE
20 INJURY, WHAT WOULD HAPPEN?

21 MR. FEE: THAT WOULD BE MORE ALONG THE LINES
22 OF SORT OF 1983 BIVENS STYLE CASES THAT INVOLVE
23 ISOLATED INCIDENTS THAT ARE THE RESULT OF INADVERTENT
24 SUBSTANDARD CARE, AS OPPOSED TO A CASE LIKE THIS WHERE
25 WE HAVE A WIDESPREAD, CLASSWIDE INTENTIONAL INFLICTION

1 OF HARM.

2 SO I GUESS WHAT I WOULD SAY IS THAT,
3 MAYBE THE MORE CLOSER ANALOGY, YOUR HONOR, MIGHT BE A
4 CASE WHERE THE GOVERNMENT PURPOSELY INJECTED
5 INCARCERATED PEOPLE WITH A TOXIN OR EXPOSED THEM TO
6 RISK OF A DISEASE. AND THEN THE INDIVIDUALS WERE
7 RELEASED BEFORE THE CASE COULD GET TO HEARING. AND IN
8 THAT INSTANCE, WOULD WE REALLY SAY THAT THE GOVERNMENT
9 HAD ESCAPED REVIEW AND ESCAPED COURT SCRUTINY OF THAT
10 ACTION SIMPLY BY VIRTUE OF THE FACT THAT THE PEOPLE
11 WERE RELEASED BEFORE WE CAN GET BEFORE A COURT?

12 THE COURT: NO, I DON'T THINK -- AND I DON'T
13 THINK THAT WAS THE BASIS FOR MY QUESTION EITHER.

14 THE ISSUE IS, WHAT'S THE RIGHT REMEDY?

15 MR. FEE: SO IN A CASE --

16 THE COURT: BY THE WAY, I DON'T SEE THE
17 DIFFERENCE WHETHER THIS IS AN INDIVIDUAL CLAIM OR A
18 CLASS CLAIM CAUSE CLASS CLAIMS ARE SUPPOSED TO BE ONES
19 THAT ARE BASED ON VERY COMMON INDIVIDUAL CLAIMS.

20 MR. FEE: WELL, I THINK IT'S DIFFERENT IN
21 TERMS OF MEASURING THE GRAVITY OF THE HARM, YOUR HONOR.
22 I MEAN, IT'S UNPRECEDENTED TO HAVE, YOU KNOW, A SORT OF
23 POLICY DRIVEN AND INTENTIONAL CAMPAIGN OF HARM LIKE WE
24 HAVE IN THIS CASE. YOU KNOW, IN THE INDIVIDUAL ACTIONS
25 WHERE INDIVIDUAL DOCTORS FAILED TO TREAT INDIVIDUALS

1 APPROPRIATELY, I MEAN, IT'S JUST A FUNDAMENTALLY
2 DIFFERENT TYPE OF CLAIM.

3 AND, LOOK, IN THIS CASE, PERHAPS A
4 DAMAGES CLAIM WOULD HAVE BEEN POSSIBLE WERE IT NOT FOR
5 THE IMMEDIACY AND THE GRAVITY OF THIS HARM. BUT IN
6 THIS CASE, WE HAVE PEOPLE WHO ARE BEING VICTIMIZED
7 DAY-TO-DAY STILL BY SOMETHING THAT HAPPENED TO THEM A
8 RELATIVELY SHORT TIME AGO. WE DON'T HAVE TIME FOR THIS
9 TO WIND ITS WAY THROUGH THE SYSTEM AND DETERMINE
10 DAMAGES DOWN THE ROAD.

11 IF WE WERE DEALING WITH A ONE-OFF
12 SITUATION, I THINK IT WOULD BE DIFFERENT. BUT IN A
13 CASE LIKE THIS WHERE YOU HAVE A POLICY -- A
14 GOVERNMENT-WIDE POLICY THAT'S AFFECTED THIS HUGE GROUP
15 OF HIGHLY-VULNERABLE PEOPLE, YOU KNOW, AN INJUNCTION IS
16 THE ONLY WAY TO ADDRESS THAT MEANINGFULLY IN A WAY THAT
17 WILL ADEQUATELY REMEDY THIS HARM THAT, FRANKLY, IS
18 GETTING WORSE BY THE DAY.

19 THE COURT: ALL RIGHT. IS THERE ANYTHING ELSE
20 YOU WANTED TO ADD AT THIS POINT, MR. FEE?

21 MR. FEE: NOTHING AT THE MOMENT.

22 THE COURT: ARE YOU GOING TO ADDRESS THE FIRST
23 TO FILE RULE?

24 MR. FEE: I THINK WE'RE GOING TO SORT OF WIND
25 THAT INTO OUR CLASS CERTIFICATION MOTION PRESENTATION.

1 THE COURT: OKAY. WHO IS GOING TO ADDRESS
2 THAT ISSUE?

3 I DON'T WANT TO HAVE YOU JUST REPEAT
4 EVERYTHING THAT'S IN THE PAPERS. I WOULD LIKE YOU TO
5 FOCUS ON THE ISSUES I'VE RAISED. SO I'M CURIOUS ABOUT
6 THAT ONE AS WELL.

7 FOR EXAMPLE, YOUR COMMENT THAT THIS NEEDS
8 IMMEDIATE -- WARRANTS IMMEDIATE RELIEF RAISES THE
9 QUESTION AS TO WHY THEN, GIVEN WHAT HAPPENED IN THE
10 MS. L. CASE WHERE THE COMPLAINT SAID "OTHER RELIEF THAT
11 IS JUST AND PROPER" -- AND I BELIEVE IN ONE OF THE
12 FILINGS IN THAT CASE IN A STATUS REPORT THERE, THE
13 PLAINTIFFS REQUESTED THAT DEFENDANTS, QUOTE, "ESTABLISH
14 A FUND TO PAY FOR PROFESSIONAL MENTAL HEALTH COUNSELING
15 WHICH WILL BE USED TO TREAT CHILDREN WHO ARE SUFFERING
16 FROM SEVERE TRAUMA AS A RESULT OF THEIR FORCIBLE
17 SEPARATION FROM THEIR PARENTS. THE AMOUNT COULD BE SET
18 AT A LATER TIME SUBJECT TO FURTHER NEGOTIATIONS BETWEEN
19 THE PARTIES AND THE RULINGS FROM THE COURT."

20 MR. FEE: YOUR HONOR, MY UNDERSTANDING OF THAT
21 REQUEST IS THAT, IT'S STILL PENDING. IT HAS NOT BEEN
22 RULED UPON. AND ITS STATUS IS, FRANKLY, NOT CLEAR
23 GIVEN THE FACT THAT THEY HAVE JUST REACHED A SETTLEMENT
24 IN THAT CASE. AND I'M NOT SURE THAT OUR CLIENTS ARE IN
25 A POSITION TO --

1 THE COURT: THE ENTIRE MATTER HAS BEEN
2 SETTLED?

3 THE APPEAL TO THE NINTH CIRCUIT HAS --

4 MR. FEE: NO. BUT ASPECTS OF THE CASE ARE
5 SUBJECT TO A SETTLEMENT THAT'S BEING FINALIZED.

6 THE COURT: OKAY. THANK YOU, MR. FEE.

7 WOULD YOU RESTATE YOUR APPEARANCE,
8 PLEASE?

9 MR. BROWN: YOUR HONOR, LOGAN BROWN ON BEHALF
10 OF PLAINTIFFS.

11 THE COURT: GOOD AFTERNOON AGAIN, MR. BROWN.

12 MR. BROWN: SO MAY IT PLEASE THE COURT, I WILL
13 JUMP RIGHT INTO YOUR FIRST TO FILE QUESTION, IF I MAY?

14 THE COURT: YES.

15 MR. BROWN: SO AS YOU ARE AWARE FROM THE
16 BRIEFS AND FROM YOUR STATEMENT EARLIER, THAT THE MAJOR
17 POINT ABOUT THE FIRST TO FILE RULE IS THAT IT'S
18 ABSOLUTELY DISCRETIONARY. AND I THINK THAT'S VERY
19 IMPORTANT TO KEEP IN MIND.

20 THE COURT: SLOW DOWN, PLEASE.

21 MR. BROWN: AND THEN THE OTHER THING, AS MY
22 COLLEAGUE, MR. FEE, HAS TALKED ABOUT, IS, THE MAIN
23 ISSUE IN MS. L. AND THE OTHER CASES THERE IS THE
24 SEPARATION IN AND OF ITSELF. IT'S THE "WHETHER OR NOT
25 SEPARATING PARENTS FROM THEIR FAMILIES" -- "FORCIBLY

1 SEPARATING THEM IS UNCONSTITUTIONAL, WHETHER OR NOT
2 THEY SHOULD BE REUNIFIED." AND, FRANKLY, THE REQUEST
3 FOR, MAYBE, A FUND TO ADDRESS OTHER HARMS AND THE -- AS
4 YOU SAID, THE OTHER APPROPRIATE RELIEF AS THE COURT
5 DETERMINES ARE VERY SECONDARY IN THAT CASE.

6 WHEREAS, IN OUR CASE, THIS IS EXACTLY
7 WHAT -- THIS IS THE TRAUMA AND ADDRESSING THE TRAUMA.
8 AND NOT JUST ADDRESSING THE TRAUMA, BUT ADDRESSING THE
9 GOVERNMENT'S RESPONSIBILITY TO CARE FOR AND TO PROTECT
10 PEOPLE BOTH IN ITS CUSTODY AND PEOPLE WHO HAVE BEEN
11 HURT THROUGH THE GOVERNMENT'S CONDUCT. THAT IS, PEOPLE
12 WHO HAVE BEEN TRAUMATIZED BY THE GOVERNMENT. THAT IS
13 THE CENTER OF THIS CASE. THAT IS THE MAIN PURPOSE OF
14 THIS CASE.

15 THE COURT: BUT ISN'T THE PREMISE OF THAT WHAT
16 WAS DECIDED IN THE MS. LEE CASE?

17 THE "MS. L. CASE," EXCUSE ME.

18 MR. BROWN: I THINK, AS THE STARTING POINT,
19 THEY ARE VERY SIMILAR. RIGHT? THEY START FROM THE
20 SAME FAMILY SEPARATION POLICY.

21 THE COURT: BUT IN THAT CASE, IT WAS
22 DETERMINED THAT THE FAMILY SEPARATION POLICY VIOLATED
23 THE DUE PROCESS CLAUSE.

24 AND ISN'T THAT A PREMISE OF THE RELIEF
25 THAT'S BEING SOUGHT HERE?

1 MR. BROWN: SO THAT IS PART OF THE COMPLAINT
2 AND PART OF THE PRELIMINARY INJUNCTION REQUEST.

3 HOWEVER, DUE TO -- THERE ARE MULTIPLE
4 LEVELS HERE. AND THAT IS ONLY THE VERY BEGINNING OF
5 THIS CASE.

6 AND WHERE THIS CASE ACTUALLY CENTERS AND
7 FOCUSES IS ACTUALLY ON THE TRAUMA AND THE GOVERNMENT'S
8 DUTY TO ADEQUATELY CARE FOR THOSE THAT IT HAS
9 TRAUMATIZED.

10 THAT IS NOT AN ISSUE THAT IS AT STAKE IN
11 THE MS. L. CASE.

12 AS MY COLLEAGUE WAS DISCUSSING ABOUT THE
13 SETTLEMENT IN THE MS. L. CASE, IT'S NOT AN ACTUAL
14 SETTLEMENT, BUT IT IS -- IT'S A BIT VAGUE IN THEIR
15 PAPERS, BUT THEY SAY THIS OUTLINES THE CENTRAL PARTS OF
16 WHAT THEY SEE AS WOULD BECOME A SETTLEMENT.

17 AND AS FAR AS THE DIFFERENCE IN FOCUS OF
18 THE TWO DIFFERENT LITIGATIONS AND WHERE THE MS. L. CASE
19 CURRENTLY STANDS, THAT GOES KIND OF TO THE PURPOSE OF
20 THE FIRST TO FILE RULE, WHICH IS, JUDICIAL EFFICIENCY
21 AND, YOU KNOW, NOT WASTING THE COURT'S RESOURCES. AND
22 BECAUSE THE ISSUE -- THE MAIN ISSUE HERE AND THE
23 QUESTION HERE IS DIFFERENT THAN THE QUESTION DOWN
24 THERE, AND BECAUSE THEY ARE ALREADY IN SETTLEMENT
25 TALKS, SENDING THIS CASE DOWN THERE MAY THROW THAT CASE

1 FOR A LOOP.

2 AND, IN ANY EVENT, THESE -- THE DISCOVERY
3 THAT'S GOING TO HAVE TO TAKE PLACE, THE EVIDENTIARY
4 MATTERS THAT WILL HAVE TO TAKE PLACE TO DEAL WITH THE
5 ISSUE OF THE GOVERNMENT'S OBLIGATION TO PROVIDE THIS
6 MENTAL HEALTHCARE IS GOING TO HAVE TO BE ADDRESSED BY
7 ONE OF THE COURT. SO THE EFFICIENCY GAINS BY
8 TRANSFERRING THE CASE WOULD BE MINIMAL.

9 THE COURT: OKAY.

10 MR. BROWN: SO IF THE -- BASED ON THE -- YOUR
11 INSTRUCTIONS, YOUR HONOR, I WILL FIRST FOCUS ON THE
12 QUESTION ABOUT, IF THE CLASS PLAINTIFFS ARE ADEQUATE
13 GIVEN THAT THEY HAVE BEEN RELEASED. THAT IS YOUR --

14 THE COURT: THAT WAS ONE OF MY QUESTIONS.

15 MR. BROWN: RIGHT.

16 SO I WOULD SAY THE ANSWER TO THIS IS
17 THREE-FOLD. THE FIRST AND THE MOST FUNDAMENTAL ANSWER
18 IS, THAT THE HARM IN THIS CASE, THE -- WHAT WE ARE
19 SEEKING IS NOT ENDED BY THE RELEASE, BY THE
20 REUNIFICATION. WE ARE SEEKING TRAUMA-INFORMED MENTAL
21 HEALTHCARE.

22 AND WHILE REUNIFICATION IS ABSOLUTELY A
23 FIRST STEP REQUIRED TO RECEIVE THAT WHICH WE SEEK, IT
24 IS NOT EVEN CLOSE TO THE END-ALL AND BE-ALL OF WHAT IS
25 NECESSARY. AND SO THE INDIVIDUAL CLAIMS FOR THE CLASS

1 PLAINTIFFS HAVE NOT BEEN MOOTED. AND THEY ADEQUATELY
2 REPRESENT THE INTERESTS OF THOSE STILL IN CUSTODY.

3 THERE'S NOTHING TO SUGGEST THAT THEIR
4 INTERESTS WOULD BE ADVERSE TO THOSE IN CUSTODY. THE
5 INJUNCTION TO RECEIVE ADEQUATE MENTAL HEALTHCARE AND
6 MENTAL HEALTHCARE SCREENS WOULD BENEFIT BOTH THOSE IN
7 CUSTODY AND THOSE WHO HAVE BEEN RELEASED AND THOSE WHO
8 POTENTIALLY MAY BECOME SEPARATED, BECOME DETAINED BY
9 THE GOVERNMENT.

10 AND THEN -- SO THAT IS -- THE MOST
11 FUNDAMENTAL PART OF THAT IS, THAT THEY'RE NOT -- THEIR
12 OWN INDIVIDUAL HARM IS NOT MOOTED. THEY STILL SHARE
13 THE SAME DAMAGE AS THE -- EXCUSE ME, THE SAME TRAUMA AS
14 THOSE WHO ARE STILL DETAINED.

15 THE OTHER TWO IS --

16 THE COURT: YOUR ESTIMATE IS THERE ARE
17 APPROXIMATELY 1,000 PARENTS WHO WOULD BE IN THE CLASS,
18 IS THAT RIGHT, WHO ARE RELATED TO 3,000 MINORS?

19 MR. BROWN: THAT IS ONE OF THE ESTIMATES, YOUR
20 HONOR.

21 THE COURT: WHAT IS YOUR ESTIMATE, IF YOU HAVE
22 ONE, AS TO HOW MANY OF THOSE 1,000 REMAIN IN CUSTODY?

23 MR. BROWN: AS I'M STANDING HERE, I DO NOT
24 HAVE AN ESTIMATE FOR YOU.

25 I WOULD -- SORRY.

1 SO I WOULD SAY THE SECOND TWO POINTS HERE
2 ARE THAT THIS -- IN TERMS OF THE CLASS INTERESTS, THIS
3 WOULD BE THE CLASSIC EXAMPLE OF A HARM THAT IS CAPABLE
4 OF REPETITION AND YET EVADING REVIEW. SO EVEN IF,
5 WHICH IS NOT THE CASE, THAT THEIR CLAIMS WERE -- YOU
6 KNOW, ALL THEY CLAIMED WAS SATISFIED BY BEING RELEASED,
7 WHICH IS NOT THE CASE, THEY WOULD -- IT STILL FITS THE
8 PERFECT EXAMPLE OF CAPABLE OF REPETITION AND YET
9 EVADING REVIEW. THE GOVERNMENT COULD ALWAYS JUST
10 RELEASE A PLAINTIFF AS SOON AS WE IDENTIFY THEM.

11 AND THEN ON THAT NOTE, AS SOON AS WE
12 IDENTIFY A POTENTIAL CLASS PLAINTIFF, WE, AS ADVOCATES,
13 WILL HAVE TO DO OUR BEST IN ORDER TO BOTH RELEASE
14 THEM -- GET THE GOVERNMENT TO RELEASE THEM AND TO
15 REUNIFY THEM WITH THEIR CHILD, WHICH, BY THE TIME WE
16 GET TO TRIAL ON A HEARING LIKE THIS, IF WE DO OUR JOBS,
17 WE SHOULD BE ABLE TO HOPEFULLY GET THEM RELEASED AND
18 REUNIFIED.

19 I DON'T KNOW IF YOU HAVE OTHER QUESTIONS
20 ON THAT EXACT POINT OR --

21 THE COURT: NO. YOU'VE ADDRESSED THAT ONE.
22 THANK YOU.

23 MR. BROWN: OKAY. SO GOING BACK TO THE
24 GENERAL THEME AND THE GENERAL PURPOSE OF BRINGING A
25 CLASS CLAIM IN THIS CASE IS THE FACT THAT WE ARE

1 CHALLENGING A POLICY -- A GOVERNMENTAL POLICY THAT HAS
2 IMPACTED ALL CLASS MEMBERS, THAT HAS INJURED ALL CLASS
3 MEMBERS AND WHICH PRESENTS FUNDAMENTAL QUESTIONS, WHICH
4 PRESENTS QUESTIONS WITH COMMON ANSWERS THAT WILL DRIVE
5 THE RESOLUTION OF THIS CASE. NAMELY, WHAT IS THE
6 GOVERNMENT'S OBLIGATION TO THESE CLASS MEMBERS? HAS
7 THE GOVERNMENT MET ITS OBLIGATION TO PROVIDE ADEQUATE
8 MENTAL HEALTHCARE? AND WHAT MUST THE GOVERNMENT DO TO
9 MEET SUCH AN OBLIGATION?

10 THE REMEDY SOUGHT HERE TO -- THIS GOES TO
11 A BIT OF WHAT YOUR -- YOUR DISCUSSION WITH MY COLLEAGUE
12 EARLIER. THE REMEDY SOUGHT HERE DOES NOT REQUIRE THE
13 COURT TO MAKE INDIVIDUALIZED INQUIRIES INTO EACH CLASS
14 MEMBER, INTO EACH CLASS PLAINTIFF AND THEIR OWN
15 CIRCUMSTANCES, INTO THEIR OWN PRIOR TRAUMA, INTO THE
16 TRAUMA --

17 THE COURT: NO, I UNDERSTAND.

18 YOUR POSITION WOULD BE THAT, THEY NEED TO
19 BE EVALUATED. AND THAT'S A COMMON NEED; CORRECT?

20 MR. BROWN: WELL -- YES. YES, AT BOTTOM.

21 THE COURT: WHAT TREATMENT MIGHT BE DETERMINED
22 AS APPROPRIATE FOLLOWING THAT EVALUATION MAY VARY, BUT
23 THAT'S NOT THE ISSUE IN TERMS OF THE RELIEF OF AN
24 EVALUATION; CORRECT?

25 MR. BROWN: CORRECT.

1 WHAT WE ARE LOOKING FOR IS ACCESS TO
2 MENTAL HEALTHCARE WHICH HAS NOT BEEN PROVIDED AND RAISE
3 AN ELEVATION IN THE BASIC PROVISIONS OF MENTAL
4 HEALTHCARE FOR THE ENTIRE CLASS. SUCH AN INJUNCTION
5 ORDERING THE GOVERNMENT TO PROVIDE THIS STANDARD OF
6 CARE WOULD BENEFIT ALL CLASS MEMBERS, PLAINTIFFS AND
7 PROPOSED CLASS MEMBERS.

8 THE COURT: JUST A MINUTE.

9 SUPPOSE, HYPOTHETICALLY, THAT THE CLASS
10 WERE LIMITED TO THOSE WHO REMAINED CONFINED OR THERE
11 WERE SUBCLASSES AND THAT WAS ONE OF THEM, AND SUPPOSE
12 THAT IT WERE DETERMINED THAT THE REQUIREMENTS OF RULE
13 23 WERE MET AND THE REQUIREMENTS FOR PRELIMINARY
14 INJUNCTION WERE MET. IF THERE WERE THEN -- AND I
15 UNDERSTAND THE GOVERNMENT HAS SUBMITTED COMPETING
16 EVIDENCE AS TO THE SCREENING THAT IT'S DOING. BUT
17 LET'S SUPPOSE, HYPOTHETICALLY, THAT OCCURRED. AND
18 THERE WAS RELIEF GRANTED REQUIRING THE SCREENING AND
19 THEN APPROPRIATE RESPONSIVE TREATMENT.

20 WOULD THAT BE -- WOULD THAT BE EFFECTIVE
21 IN TERMS OF THE ISSUES THAT I'VE RAISED EARLIER
22 CONCERNING HOW WOULD THIS BE DONE WITH THOSE WHO ARE
23 NOT IN CUSTODY OR NO LONGER IN THE UNITED STATES?

24 WOULD YOU LEARN FROM THAT AND POTENTIALLY
25 BE ABLE BETTER TO FRAME THE ISSUES WITH RESPECT TO

1 THOSE IN THAT OTHER CATEGORY?

2 MR. BROWN: YES, YOUR HONOR. I THINK THAT
3 WOULD HELP.

4 MY ONE CONCERN WOULD ONLY BE THAT -- SO
5 SUBCLASSES WOULD POTENTIALLY HELP. MY -- SO I GUESS I
6 HAVE TO ASK A QUESTION OF YOU. YOU'RE PROPOSING TO
7 HAVE A SUBCLASS OF --

8 THE COURT: I'M NOT PROPOSING. I'M ASKING
9 QUESTIONS.

10 MR. BROWN: YOU'RE ASKING IF YOU HAD A
11 SUBCLASS OF THOSE STILL INCARCERATED AND THEN A
12 SUBCLASS OF THOSE NO LONGER INCARCERATED?

13 THE COURT: MY QUESTION IS, IF THE CLASS WERE
14 LIMITED OR THERE WAS A SUBCLASS ESTABLISHED OF THOSE
15 WHO REMAINED INCARCERATED AND, HYPOTHETICALLY, RELIEF
16 WAS GRANTED ON A PRELIMINARY BASIS THAT THEY WERE TO BE
17 SCREENED IN A MORE ROBUST MANNER THAN THEY HAD
18 PREVIOUSLY BEEN SCREENED AND THEN PROVIDED RESPONSIVE
19 CARE. I RECOGNIZE THAT THE POSITION YOU'RE ADVANCING
20 IS, THAT THAT WOULDN'T HELP THOSE WHO ARE NO LONGER IN
21 CUSTODY OR DETENTION OR SOME RELATED PORTION OF THAT.

22 BUT GOING BACK TO THE QUESTIONS THAT I
23 PREVIOUSLY ASKED OF MR. FEE WHERE HE SAID, "WELL, THIS
24 DEPENDS ON WHAT WE LEARN AND WHAT WE KNOW." MY
25 QUESTION IS, WHETHER THIS WOULD POTENTIALLY PROVIDE

1 INSIGHT THAT MIGHT BE THEN APPLIED SHOULD I -- IN
2 CONNECTION WITH A LATER POTENTIAL CERTIFICATION OF
3 EITHER A BROADER CLASS OR A DIFFERENT SUBCLASS?

4 MR. BROWN: YES, YOUR HONOR.

5 SORRY, I MISUNDERSTOOD BEFORE.

6 YES, ABSOLUTELY THAT WOULD PROVIDE
7 EXACTLY WHAT YOU WERE SAYING.

8 THE COURT: OKAY.

9 MR. BROWN: IF YOUR HONOR HAS NO MORE
10 QUESTIONS --

11 THE COURT: THANK YOU, MR. BROWN.

12 IS THERE ANYONE ELSE WHO IS GOING TO
13 SPEAK FOR THE PLAINTIFFS AT THIS POINT?

14 MR. ROSENBAUM: GOOD AFTERNOON.

15 I KNOW I SPEAK ON BEHALF OF ALL COUNSEL
16 IN THANKING THE COURT FOR THE DEGREE OF PREPARATION,
17 WHICH IS ALREADY QUITE EVIDENT.

18 I WANT TO SPEAK BRIEFLY TO THE FIRST TO
19 FILE QUESTION THAT THE COURT HAS RAISED.

20 THE COURT: I THINK THAT WAS JUST ANSWERED.

21 IS THERE SOMETHING NEW?

22 MR. ROSENBAUM: YES. I JUST WANTED TO RAISE
23 ONE POINT WITH RESPECT TO THE EFFICIENCY CAUSE YOUR
24 HONOR PUT HIS FINGER ON THE -- WHAT IS THE DISTINCTIVE
25 ISSUE? AND THAT IS, IF IN FACT, IN THAT CASE, IF IT

1 WERE NOT AT THE POINT OF PROGRESS THAT IT IS NOW, AND
2 IF IN FACT SCREENINGS HAD TAKEN PLACE, THEN THERE MIGHT
3 BE AN EFFICIENCY IN TERMS OF PUTTING IT ALL UNDER THE
4 SAME TENT.

5 BUT WHERE THE SCREENINGS IN FACT HAVE NOT
6 TAKEN PLACE, AND AS COUNSEL HAS REPRESENTED, THAT CASE
7 IS MOVING ALONG. TO SAY PUT THE BRAKES ON IT IN ORDER
8 FOR THE SCREENINGS TO TAKE PLACE, IN ORDER FOR US TO
9 LEARN WHAT THE DEGREE AND THE SCOPE OF THE REMEDY WOULD
10 HAVE TO BE, WOULD IN FACT -- THAT'S A WHOLE NEW SET OF
11 ISSUES FOR JUDGE SABRAW. THAT'S A WHOLE NEW SET OF
12 FACTS FOR JUDGE SABRAW. AND IT IS IN FACT A DIFFERENT
13 OPERATIVE THEORY THAN WHAT IS TAKING PLACE IN THAT
14 PARTICULAR CASE.

15 THE COURT: WELL, I THINK IT'S A DIFFERENT
16 REMEDY.

17 THE REMEDY SOUGHT THERE WAS INJUNCTIVE
18 RELIEF WITH RESPECT TO THE POLICY AND THE NEED TO
19 REUNITE; CORRECT?

20 IT WASN'T ABOUT WHAT OTHER REMEDIES MIGHT
21 THEN BE APPROPRIATE, IF THERE WERE A BASIS FOR THAT
22 ONE.

23 MR. ROSENBAUM: EXACTLY RIGHT.

24 SO THE REUNIFICATIONS HAVE TAKEN PLACE
25 AND THE POLICY HAS STOPPED. BUT THERE HAS BEEN NO

1 INSIGHT IN TERMS OF WHAT MENTAL HEALTH NEEDS ARE FOR
2 ANY OF THE INDIVIDUALS THEMSELVES THAT ARE INVOLVED,
3 WHICH GOES TO THE SECOND POINT THAT I UNDERSTAND YOUR
4 COURT -- YOUR HONOR TO MAKE. AND THAT IS, LOOK, WE'RE
5 TALKING ABOUT PRACTICALITIES HERE. IF INDIVIDUALS ARE
6 IN ANOTHER COUNTRY RIGHT NOW, THAT AFFECTS THE
7 INJUNCTIVE BALANCE IN TERMS OF WHAT MAY BE A REASONABLE
8 SORT OF SOLUTION IN THIS SITUATION.

9 BUT WHERE WE ARE SEEKING AS A STARTING
10 POINT ARE SCREENINGS. SO THAT WE KNOW PRECISELY WHAT
11 WE'RE DEALING WITH AND WHERE WE HAVE A NETWORK OF THE
12 LEADING PROFESSIONALS IN THIS COUNTRY WHO HAVE STATED
13 THAT THEY ARE WILLING TO BE INVOLVED IN THAT PROCESS.
14 THAT'S AN ENTIRELY DIFFERENT MATTER.

15 MOREOVER, JUDGE SABRAW HAS NOT RULED ON
16 THE ISSUE. HE HAS RULED, AS YOUR HONOR HAS POINTED
17 OUT, ON THE ISSUE AS TO WHETHER OR NOT THE SEPARATION
18 ITSELF CREATED A CONSTITUTIONAL VIOLATION.

19 WHAT HE HAS NOT CONSIDERED IS WHETHER OR
20 NOT A DELIBERATE POLICY OF INFLICTING TRAUMA ON
21 INDIVIDUALS ITSELF CREATES A SEPARATE CONSTITUTIONAL
22 CLAIM. THAT MATTER IS NOT ON APPEAL. THAT MATTER WAS
23 NEVER ADJUDICATED. WE'RE STARTING FROM SCRATCH WITH
24 RESPECT TO THAT PARTICULAR ISSUE.

25 THE COURT: OKAY. ALL RIGHT. THANK YOU,

1 MR. ROSENBAUM.

2 MR. ROSENBAUM: THANK YOU.

3 THE COURT: MR. HEYSE, LET ME HEAR FROM YOU,
4 PLEASE.

5 MR. HEYSE: MICHAEL HEYSE ON BEHALF OF THE
6 DEFENDANTS FROM THE UNITED STATES DEPARTMENT OF
7 JUSTICE.

8 THE COURT: THANK YOU.

9 MR. HEYSE: ADDRESSING YOUR HONOR'S QUESTIONS
10 IN ORDER. REGARDING THE FIRST TO FILE RULE, THIS CASE
11 INVOLVES AN IDENTICAL GROUP OF INDIVIDUALS. THE
12 CLASSES, THE CLASS DEFINITIONS MATCH ALMOST VERBATIM.
13 I THINK THERE'S A TWO-WORD DIFFERENCE.

14 THE QUESTION THAT PLAINTIFFS WANT YOUR
15 HONOR TO SEE IS THAT, THE INDIVIDUALS IN MS. L. HAVE
16 NOT SOUGHT THIS RELIEF. SO THAT'S THE DEPARTURE.
17 THEY'RE SEEKING DIFFERENT RELIEF, AS YOUR HONOR JUST
18 POINTED OUT.

19 THE COURT: JUST A MINUTE.

20 THERE IS A DIFFERENCE IN THE CLASS
21 DEFINITIONS BECAUSE, HERE, IT'S, "WERE, ARE OR WILL BE
22 DETAINED." AND, THERE, IT'S NOT. IT'S "ARE OR WILL
23 BE."

24 MR. HEYSE: I BELIEVE IT SAID, "HAVE BEEN," IF
25 I REMEMBER CORRECTLY. I CITED --

1 THE COURT: "ALL ADULT PARENTS WHO, ONE, ARE
2 OR WILL BE DETAINED IN IMMIGRATION CUSTODY," DOT, DOT,
3 DOT. "TWO, HAVE A MINOR CHILD WHO IS OR WILL BE
4 SEPARATED FROM THEM BY DHS AND DETAINED IN O.R.R.
5 CUSTODY," DOT, DOT, DOT.

6 WHEREAS, HERE, MY UNDERSTANDING IS, "ALL
7 ADULT PARENTS NATIONWIDE WHO WERE, ARE OR WILL BE
8 DETAINED."

9 MR. HEYSE: I CAN GRAB MY FILING.

10 THIS WAS PULLED DIRECTLY FROM THE MS. L.
11 DECISION. I'M NOT SURE FROM WHAT YOUR HONOR IS
12 READING.

13 I HAVE, FROM MS. L., QUOTE, "ALL ADULT
14 PARENTS WHO ENTER THE UNITED STATES AT OR BETWEEN
15 DESIGNATED PORTS OF ENTRY WHO, ONE, HAVE BEEN, ARE OR
16 WILL BE DETAINED IN IMMIGRATION CUSTODY BY DHS. AND,
17 TWO, HAVE A MINOR CHILD WHO IS OR WILL BE SEPARATED
18 FROM THEM BY DHS AND DETAINED IN O.R.R. CUSTODY, O.R.R.
19 FOSTER CARE OR DHS CUSTODY ABSENT A DETERMINATION THAT
20 THE PARENT IS UNFIT OR PRESENTS A DANGER TO THE CHILD."

21 THE COURT: WHAT'S THE DATE OF THAT ORDER?

22 MR. HEYSE: JUNE 26TH, 2018.

23 THE COURT: OKAY. WELL, I'LL LOOK AT IT
24 AGAIN.

25 THE ORDER FROM WHICH I'M READING IS THE

1 SAME DATE, DOCKET 82 AT PAGE 5.

2 MR. HEYSE: INTERESTING.

3 THE COURT: GO AHEAD.

4 MR. HEYSE: WE CAN RESOLVE THAT.

5 BUT, ULTIMATELY, THE QUESTION IS NOT
6 WHETHER OR NOT THEY HAVE SOUGHT THAT RELIEF. IT'S
7 WHETHER OR NOT THEY COULD HAVE. AND, IN FACT, THEY
8 HAVE. AS YOUR HONOR POINTED OUT IN THE JOINT REPORT
9 THAT WAS SUBMITTED ON JULY 12TH -- OR JULY -- I BELIEVE
10 IT WAS JULY 12TH. THE JOINT REPORT THAT DAY
11 REQUESTED -- I BELIEVE IT'S PARAGRAPH 7, THE LAST PAGE
12 REQUESTS A MENTAL HEALTH FUND. THIS IS NOT SOME VAGUE
13 REQUEST FOR OTHER RELIEF. THIS IS A MENTAL HEALTH
14 TREATMENT FUND.

15 THE COURT: DO YOU KNOW THE STATUS OF -- ARE
16 YOU COUNSEL IN THAT CASE?

17 MR. HEYSE: I'M NOT. THE DEPARTMENT OF
18 JUSTICE HAS MANY, MANY ATTORNEYS WORKING ON ALL OF
19 THESE MATTERS.

20 THE COURT: NO, I UNDERSTAND. BECAUSE IT'S
21 JUST A STATEMENT IN A STATUS REPORT BY ONE SIDE, I
22 DON'T KNOW WHAT HAPPENED TO IT.

23 MR. HEYSE: RIGHT.

24 BUT THAT'S THE POINT, IS THAT THEY COULD
25 ASK FOR IT. AS YOUR HONOR POINTED OUT EARLIER, IN

1 THEIR COMPLAINT, THEY COULD SEEK OTHER FORMS OF RELIEF.
2 AND THAT'S CERTAINLY SOMETHING THAT WOULD MAKE SENSE
3 FOR THEM TO PURSUE, WHICH IS WHY CLAIM SPLITTING IS A
4 DOCTRINE THAT TALKS ABOUT EFFICIENCY, IF IT'S
5 SOMETHING -- AND, YOU KNOW, EVENTUALLY GETTING INTO
6 RES JUDICATA PRINCIPLES, COLLATERAL ESTOPPEL, THINGS
7 LIKE THAT. IT'S CLAIMS THAT SHOULD HAVE BEEN RAISED
8 THAT WEREN'T OR THAT STILL COULD BE. THERE'S NO
9 REASON, IN MS. L., THAT THEY COULD NOT FILE AN AMENDED
10 COMPLAINT.

11 THE COURT: WELL, IT'S NOT UNCOMMON IN CIVIL
12 LITIGATION TO HAVE DIFFERENT CLASS ACTIONS FILED AT THE
13 SAME TIME WHICH COVER SOME OR ALL OF THE SAME CLAIMS;
14 RIGHT?

15 AND THEN MANAGEMENT HAS TO BE DONE,
16 DECISIONS MADE ABOUT HOW TO DEAL WITH THESE
17 OVERLAPPING -- POTENTIALLY OVERLAPPING CLASS CLAIMS.

18 MR. HEYSE: YES. IT IS A DISCRETIONARY
19 QUESTION, THE FIRST TO FILE RULE. SO IT'S UP TO YOUR
20 HONOR WHETHER OR NOT YOUR HONOR WANTS TO EXPEND THE
21 MASSIVE AMOUNTS OF RESOURCES REQUIRED TO DEAL WITH A
22 CLASS ACTION SUIT. THERE'S NO QUESTION THAT THESE
23 CASES ARE NOT SIMPLE. AND IT --

24 THE COURT: DID YOU FIND ANY AUTHORITY THAT
25 SAYS, IN THE CLASS ACTION CONTEXT, A MEMBER OF AN

1 INJUNCTIVE RELIEF CLASS THAT HAS BEEN CERTIFIED IS
2 LIMITED IN BRINGING -- BEING A CLASS REPRESENTATIVE IN
3 A SEPARATE CLASS?

4 MR. HEYSE: WELL, IT'S WAL-MART. IT STATES
5 THAT AN INDIVIDUAL THAT'S A MEMBER OF AN EXISTING
6 INJUNCTIVE RELIEF CLASS, A B(2) CLASS, CANNOT OPT-OUT
7 FROM THAT CLASS. SO IT'S NOT EXACTLY THE SAME THING.
8 THEY'RE TRYING TO BE MEMBERS OF TWO CLASSES AT THE SAME
9 TIME.

10 THE COURT: OKAY.

11 MR. HEYSE: BUT, ULTIMATELY, THEY'RE TRYING TO
12 CREATE A SECOND CASE THAT IS GOING BEYOND WHAT HAS BEEN
13 SOUGHT IN MS. L. WHY THAT WASN'T MORE SPECIFICALLY
14 PLED, WHY IT WASN'T RAISED IN A COMPLAINT, WHY IT
15 HASN'T BEEN FURTHER DEVELOPED IS NOT CLEAR. BUT IT
16 CERTAINLY COULD HAVE BEEN. SO THAT GETS TO THE
17 QUESTION OF EFFICIENCY OF COURT RESOURCES.

18 ULTIMATELY, THE QUESTION HERE ON A
19 PRELIMINARY INJUNCTION IS WHETHER OR NOT THEY HAVE
20 DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE
21 MERITS OF THEIR CLAIMS. AND AS YOUR HONOR POINTED OUT,
22 THERE ARE DISTINCT DIFFERENCES BETWEEN DETAINED
23 INDIVIDUALS AND RELEASED INDIVIDUALS. ALL OF THE
24 PLAINTIFFS HERE HAVE BEEN RELEASED AND REUNITED WITH
25 THEIR CHILDREN.

1 THE COURT: YOU MEAN THE CLASS
2 REPRESENTATIVES?

3 MR. HEYSE: YES. THE NAMED PLAINTIFFS THAT WE
4 HAVE HERE.

5 AND THAT'S ACTUALLY AN IMPORTANT QUESTION
6 AS WELL, IS WHETHER OR NOT THE CHILDREN ARE DE FACTO
7 PLAINTIFFS HERE AS WELL. SO IT'S A QUESTION WE'LL BACK
8 COME BACK TO. BUT MANY OF THE CLAIMS IN THIS CASE
9 INVOLVE --

10 THE COURT: CAN CHILDREN BE PLAINTIFFS WITHOUT
11 A GUARDIAN AD LITEM?

12 MR. HEYSE: TO THE EXTENT THAT THERE ARE
13 CLAIMS AS TO TREATMENT THE CHILDREN RECEIVED, THEY
14 SHOULD BE PLAINTIFFS. THE PARENTS HERE ARE CLAIMING
15 THAT THEY NEED MENTAL HEALTHCARE, BUT THAT IS FAMILY
16 BASED. THAT INHERENTLY INVOLVE THE CHILDREN. ALSO
17 RIFE THROUGHOUT THEIR PLEADINGS ARE STATEMENTS ABOUT
18 THE HARM TO THE CHILDREN.

19 IN ANY EVENT, WHAT THEY'RE SEEKING HERE
20 IS COMPENSATORY DAMAGES --

21 THE COURT: WAIT A MINUTE.

22 WITH RESPECT TO THE CHILDREN, ARE YOU --
23 ISN'T THERE -- ISN'T THE NORM THAT PARENTS MAKE
24 DECISIONS ABOUT THEIR CHILDREN ABSENT THE LIMITATIONS
25 HERE THAT THE PARENT IS A DANGER OR DOESN'T WANT TO BE

1 REUNITED? AND YOU'RE SAYING THAT, ANYTIME A PARENT
2 SEEKS SOME RELIEF AS TO A CHILD, THE CHILD GETS -- HAS
3 SEPARATE COUNSEL?

4 MR. HEYSE: NOT SEPARATE COUNSEL, BUT THEY
5 NEED TO BE SPECIFICALLY INCLUDED IN THIS MATTER. AT
6 THIS POINT, THEY'RE PRESENT. BUT THEY HAVEN'T -- THEIR
7 OWN INDIVIDUAL CLAIMS ARE NOT DIRECTLY BEFORE THE
8 COURT.

9 FOR EXAMPLE, THERE'S A PRETTY BIG
10 DISTINCTION BETWEEN BEING IN IMMIGRATION DETENTION AS
11 OPPOSED TO O.R.R. CUSTODY, WHICH IS ABSOLUTELY NOT
12 DETENTION. O.R.R. HAS SEPARATE STANDARDS THAT APPLY TO
13 TREATMENT OF CHILDREN FOR OBVIOUS REASONS. THERE'S A
14 WHOLE HOST OF ISSUES ASSOCIATED WITH BEING AN
15 UNACCOMPANIED MINOR IN THE UNITED STATES, WHEREAS
16 PARENTS ARE SUBJECTED TO DHS DETENTION STANDARDS.

17 SO TO THE EXTENT THERE ARE DIVERGENT
18 INTERESTS THERE, OBVIOUSLY, THE PARENT IS PRESUMED TO
19 WANT THE BEST INTERESTS -- TO FULFILL THE BEST
20 INTERESTS OF THE CHILD. BUT, ULTIMATELY, HERE, WE
21 HAVE, AT A MINIMUM, MIXED CLAIMS.

22 THE COURT: I DON'T WANT TO OVERDO THIS, BUT
23 ARE YOU -- WHAT ARE YOU SUGGESTING?

24 HOW WOULD THE CHILDREN BE HEARD OTHER
25 THAN THROUGH THEIR PARENTS?

1 MR. HEYSE: THEY SHOULD BE NAMED PLAINTIFFS.

2 THE COURT: NAMED PLAINTIFFS?

3 MR. HEYSE: ADDED AS NAMED PLAINTIFFS.

4 THE COURT: AND WHAT VALUE DOES THAT ADD IF
5 THEY'RE REPRESENTED BY THE SAME COUNSEL WHO ARE SAYING
6 THE PARENTS WANT TO HAVE THIS BENEFIT FOR THE CHILDREN?

7 MR. HEYSE: AN EXAMPLE IS A PENDING MATTER IN
8 THE DISTRICT OF MASSACHUSETTS, K.O. VERSUS SESSIONS.
9 IT WAS FILED LAST WEEK. IT SEEKS TORT DAMAGES ON
10 BEHALF OF CHILDREN THAT WERE DENIED MENTAL HEALTHCARE.
11 IT'S THIS CASE SPECIFIC TO JUST THE CHILDREN.

12 THE COURT: IT'S A FEDERAL TORT CLAIMS ACT
13 CASE?

14 MR. HEYSE: YES, YOUR HONOR.

15 THE COURT: AND CLAIMS ARE BEING BROUGHT ON
16 BEHALF -- SEEKING --

17 MR. HEYSE: JUST THE CHILDREN.

18 THE COURT: OKAY.

19 MR. HEYSE: THERE'S A LOT OF COMPETING
20 STANDARDS, IS THE POINT. THERE'S -- AGAIN, O.R.R. HAS
21 DIFFERENT OBLIGATIONS DIFFERENT THAN DHS.

22 THE COURT: NO, I UNDERSTAND THAT.

23 BUT THE REMEDY BEING SOUGHT THERE IS
24 MONEY DAMAGES FOR THE PLAINTIFFS WHO ARE CHILDREN. SO
25 THEY WOULD HAVE TO HAVE, PRESUMABLY, GUARDIAN AD LITEM

1 REPRESENTATION ON WHAT THEIR INTERESTS ARE. I'M NOT
2 QUITE SURE HOW THAT APPLIES IN THE INJUNCTIVE RELIEF
3 CONTEXT WHERE THE INJUNCTIVE RELIEF BEING SOUGHT IS
4 SCREENING AND THEN POTENTIALLY SERVICES.

5 MR. HEYSE: ULTIMATELY, AGAIN, THE QUESTION IS
6 WHAT SERVICES ARE TO BE PROVIDED? THE SERVICES WHILE
7 IN DETENTION VERSUS CUSTODY -- EXCUSE ME, THE SERVICES
8 PROVIDED IN THAT CONTEXT TO BE CONSTITUTIONAL MUST BE
9 ADEQUATE.

10 PLAINTIFFS ARGUE THAT THE -- WHAT THEY
11 RECEIVED SO FAR IS NOT. DEFENDANT'S DISAGREE. THE
12 SERVICES PROVIDED INVOLVED COUNSELING SESSIONS, THE
13 OPPORTUNITY TO REQUEST SERVICES. THEY ARE SCREENED
14 UPON ARRIVAL. THEY RECEIVE MEDICAL SCREENINGS
15 IMMEDIATELY UPON ARRIVAL. THEY ARE AVAILED OF OTHER
16 SERVICES ON SITE. THEY CAN AFFIRMATIVELY REQUEST MORE
17 SERVICES. THERE'S ALSO INSTANCES WHERE THE OTHER
18 DETAINEES WILL REPORT OTHER PROBLEMS THAT SOMEONE ELSE
19 IS HAVING TO DETENTION STAFF, AND THEY WILL ACT ON
20 THAT.

21 OBVIOUSLY, THIS WILL COME OUT IN
22 DISCOVERY. BUT THE POINT IS, WHAT IS CONSTITUTIONALLY
23 ADEQUATE DOES NOT RISE TO THE LEVEL OF THE, QUOTE,
24 "APPROPRIATE CARE" THAT PLAINTIFFS ARE ASKING FOR.

25 WHAT THEY'RE ASKING FOR -- AND IT'S

1 CONFUSING, AS WE'VE HEARD TODAY. WE DON'T ACTUALLY
2 KNOW WHAT THEY'RE ASKING FOR. WE DON'T KNOW WHAT KIND
3 OF CARE THEY WANT OR HOW IT WOULD BE ADMINISTERED, HOW
4 IT WOULD BE PAID FOR. WOULD IT BE A VOUCHER? WOULD IT
5 BE --

6 THE COURT: YOU'RE TALKING NOW ABOUT THOSE WHO
7 ARE NO LONGER IN CUSTODY THEN; RIGHT?

8 MR. HEYSE: YES.

9 IN TERMS OF THOSE THAT ARE IN CUSTODY,
10 THE CARE THAT THEY ARE RECEIVING IS ADEQUATE.
11 DEFENDANT'S POSITION IS THAT THEY ARE RECEIVING THIS
12 CARE. AS I DETAILED, THEY DO RECEIVE SCREENINGS. THEY
13 DO HAVE A FORM THAT IS MADE AVAILABLE TO FILL OUT. IF
14 THEY ARE CONTINUING TO SUFFER, THE LIKELIHOOD WHILE IN
15 DETENTION THAT IT WOULD GO COMPLETELY IGNORED IS SIMPLY
16 IMPOSSIBLE -- VIRTUALLY IMPOSSIBLE. NEVER SAY "NEVER,"
17 YOUR HONOR.

18 BUT IN ORDER FOR THAT CARE, THE CARE THAT
19 IS PROVIDED TO RISE TO THE LEVEL OF A CONSTITUTIONAL
20 VIOLATION, IT MUST BE CONSCIENCE SHOCKING, DELIBERATE
21 INDIFFERENCE TO THE NEEDS OF THESE INDIVIDUALS.

22 THE COURT: IN TERMS OF THE CURRENT SCREENING,
23 THAT'S DONE THROUGH THE -- IS THAT THE PSIQ?

24 MR. HEYSE: I BELIEVE THAT SOUNDS ACCURATE.

25 THE COURT: WELL, THERE'S COMPETING EVIDENCE

1 ON THAT ISSUE AS TO WHETHER THAT'S ADEQUATE SCREENING
2 OR THE WAY IT'S DONE IS ADEQUATE SCREENING.

3 BUT WITH RESPECT TO THOSE WHO ARE IN
4 DETENTION, IF WHAT YOU'RE SAYING IS, THERE'S A POLICY
5 TO PROVIDE THEM WITH APPROPRIATE MEDICAL CARE,
6 INCLUDING MENTAL HEALTH SERVICES, AND THERE'S A
7 SCREENING THAT'S DONE TO DETERMINE WHAT, IF ANY, SUCH
8 SERVICES ARE APPROPRIATE, IF IT WERE DETERMINED THAT
9 THE PSIQ PROCESS IN THAT SCREENING PROCESS WAS NOT
10 APPROPRIATE UNDER THE STANDARDS OF A PRELIMINARY
11 INJUNCTION, THEN WHY WOULD IT BE INAPPROPRIATE TO GRANT
12 THAT RELIEF, BETTER SCREENING, IF IT'S ALREADY
13 SOMETHING THAT'S ACKNOWLEDGED?

14 MR. HEYSE: IN THIS CASE, THAT RUNS INTO AN
15 INTERESTING PROCEDURAL SITUATION INASMUCH AS THE NAMED
16 PLAINTIFFS THAT WE HAVE HERE LACK STANDING TO BRING
17 THAT CLAIM INASMUCH AS THEY ARE NO LONGER DETAINED.

18 THE COURT: WHAT ABOUT THE ARGUMENT THAT THE
19 MOOTNESS -- THE EQUIVALENT OF A MOOTNESS ARGUMENT,
20 LIKELY TO BE REPEATED WITHOUT BEING REVIEWED?

21 MR. HEYSE: FIRST, THAT'S CONCEDED THAT THEIR
22 CLAIMS ARE MOOT.

23 SECOND, THAT'S ALSO ASSUMING THAT THE
24 GOVERNMENT IS GOING TO VIOLATE AN EXISTING COURT ORDER
25 THAT PREVENTS THE GOVERNMENT FROM SEPARATING PARENTS

1 FROM THEIR CHILDREN.

2 IF YOUR HONOR IS TALKING ABOUT CHANGING
3 THE ENTIRE MENTAL HEALTH POLICY OF DHS AS TO DETAINEES,
4 THAT'S GOING FAR BEYOND THE SCOPE OF THIS CASE.

5 THE COURT: NO. I'M FOCUSING ON THE
6 INDIVIDUAL -- THE CLASS -- THE PROPOSED CLASS HERE.
7 AND I'M ASKING, IF THE RELIEF BEING SOUGHT WERE
8 GRANTED -- IF SOME OF THE RELIEF BEING SOUGHT WERE
9 GRANTED, WHICH INCLUDES SCREENING, IS THAT MATERIALLY
10 DIFFERENT THAN -- ISN'T SCREENING PRESENTLY PART OF
11 WHAT HAPPENS?

12 MR. HEYSE: YES.

13 AS YOUR HONOR WAS INDICATING, IF THAT
14 SCREENING IS FOUND TO BE INADEQUATE, CAN THIS COURT
15 ORDER A CHANGE TO THE SCREENING PROCEDURE?

16 THE COURT: ASSUMING THE REQUIREMENTS OF THE
17 PRELIMINARY INJUNCTION ARE SATISFIED OR ULTIMATELY IN A
18 FINAL INJUNCTION.

19 MR. HEYSE: RIGHT.

20 THERE'S, AGAIN, A LOT OF OTHER MOVING
21 PARTS TO THAT.

22 THE QUESTION HERE IS, WHETHER OR NOT
23 THESE INDIVIDUALS CAN SEEK THAT.

24 THE COURT: I UNDERSTAND.

25 MR. HEYSE: SO, AGAIN, THE GOVERNMENT IS

1 ACTIVELY WORKING TO COMPLY WITH THE MS. L. INJUNCTION.

2 THERE ARE WEEKLY STATUS REPORTS AS TO --

3 THE COURT: WITH JUDGE SABRAW?

4 MR. HEYSE: YES.

5 I BELIEVE THERE'S A REPORT DUE TODAY,
6 ACTUALLY. THE LAST REPORT WE HAVE IS FROM LAST FRIDAY,
7 I BELIEVE. IT MIGHT BE THURSDAY.

8 THE COURT: DO YOU HAVE ANY ESTIMATE -- I
9 ASKED EARLIER ABOUT THIS, THE ESTIMATE OF A THOUSAND --
10 THERE WOULD UP TO A THOUSAND ADULTS IN THE PROPOSED
11 CLASS HERE.

12 DO YOU HAVE ANY ESTIMATE OF WHETHER THAT
13 IS ACCURATE?

14 AND, IF SO, WHAT PERCENTAGE OF THAT GROUP
15 IS STILL IN CUSTODY?

16 MR. HEYSE: THE FIGURES PROVIDED IN MS. L.
17 FOCUSED ON THE CHILDREN. THERE WERE A LITTLE OVER 2600
18 CHILDREN IN O.R.R. CUSTODY AS PART OF THIS. 20 --
19 ABOUT 84 PERCENT OF THEM HAVE BEEN RELEASED AND
20 REUNITED WITH THEIR PARENT.

21 YOUR HONOR'S QUESTION EARLIER ASKED, HOW
22 MANY OF THE POTENTIAL CLASS MEMBERS REMAIN DETAINED?
23 SEVEN CHILDREN STILL IN O.R.R. CUSTODY HAVE A PARENT
24 WHO IS IN SOME KIND OF LAW ENFORCEMENT CUSTODY,
25 "SEVEN."

1 THE COURT: NATIONWIDE?

2 MR. HEYSE: YES.

3 THERE ARE 211 CLASS MEMBER CHILDREN
4 REMAINING TO BE REUNIFIED. OF THOSE, 165 OF THEIR
5 PARENTS ARE OUTSIDE OF THE UNITED STATES.

6 THE COURT: JUST A MINUTE.

7 MR. HEYSE: THE CHARTS THAT ARE PROVIDED ARE
8 DIFFICULT.

9 THE COURT: JUST A MOMENT.

10 IF I UNDERSTAND WHAT YOU JUST SAID,
11 NATIONWIDE, AT THIS TIME, THERE ARE ONLY SEVEN CHILDREN
12 WHO REMAIN IN O.R.R. CUSTODY WHOSE PARENTS ARE ALSO IN
13 SOME FORM OF CUSTODY?

14 MR. HEYSE: YES, YOUR HONOR.

15 THE COURT: SO ONE CALCULATION -- IF I
16 UNDERSTAND WHAT YOU'RE SAYING, ASSUMING EACH OF THESE
17 SEVEN HAD TWO PARENTS, THAT WOULD BE -- THAT COULD BE
18 AS MANY AS 14 PARENTS. THERE COULD BE STEP-PARENTS, I
19 SUPPOSE, OR ADOPTIVE PARENTS. IT COULD BE HIGHER.

20 IS THAT YOUR VIEW, THAT THE NUMBER OF
21 PARENTS IN THIS PROPOSED CLASS WHO REMAIN DETAINED IS
22 LESS THAN 20?

23 MR. HEYSE: YES.

24 THE COURT: OKAY. GO AHEAD.

25 MR. HEYSE: OKAY. WITH RESPECT TO THEIR --

1 THESE EXISTING PLAINTIFFS' CLAIMS, AGAIN, THEY HAVE --

2 THE COURT: WITH RESPECT TO THE PARENTS, 20 --

3 LESS THAN 20 ARE DETAINED?

4 MR. HEYSE: YES.

5 THE COURT: IS THERE A HIGHER -- ARE THERE

6 OTHERS WHO HAVE NOT BEEN FULLY -- SOME ARE NO LONGER IN

7 THE UNITED STATES?

8 MR. HEYSE: YES.

9 THE COURT: ARE THERE OTHERS WHO HAVE BEEN

10 RELEASED ON CERTAIN CONDITIONS OR UNDER RESTRICTIONS,

11 WHETHER BOND OR OTHERWISE?

12 MR. HEYSE: I BELIEVE MANY BONDED OUT, YES.

13 THEY HAVE BEEN RELEASED ON BOND. AND THEY'RE IN

14 REMOVAL PROCEEDINGS OF SOME KIND.

15 THE COURT: IS THERE ANY OTHER CATEGORY

16 BESIDES IN CUSTODY, OUT OF CUSTODY, ON BOND AND LEFT

17 THE UNITED STATES?

18 MR. HEYSE: THERE'S ONE PARENT WHO RAISED A,

19 QUOTE, "RED FLAG" PREVENTING REUNIFICATION. THEY'RE

20 NOT --

21 THE COURT: THE APPROPRIATENESS OF HAVING THAT

22 PARENT REUNITED WITH HIS OR HER CHILDREN?

23 MR. HEYSE: YES.

24 THERE ARE A FEW CASES, I BELIEVE, WHERE

25 THE PARENT HAD BEEN CONVICTED OF SOME KIND OF CHILD

1 MOLESTATION OR CHILD ABUSE, SOMETHING LIKE THAT.

2 BUT WE ARE NOT TALKING ABOUT AN
3 INCREDIBLE NUMBER OF DETAINED INDIVIDUALS AT THIS
4 POINT.

5 THERE ARE, AT THIS TIME, BY MY MATH, 437
6 CHILDREN NOT YET REUNITED WITH THEIR PARENTS. BUT,
7 AGAIN, THERE'S SO MANY SUBDIVISIONS AS TO WHY AND WHERE
8 THEY ARE.

9 THE CHART IS TABLE 1, ECF DOCKET NUMBER
10 222 IN MS. L. IT'S ON PAGE 4 OF THAT DOCUMENT.

11 ULTIMATELY, WHAT IS BEFORE THE COURT HERE
12 IS, IN REALITY, AN INTENTIONAL INFLICTION OF EMOTIONAL
13 DISTRESS CLAIM. THAT'S A TORT. IT INVOLVES A DUTY,
14 BREACH, HARM AND CAUSE.

15 AND WHETHER OR NOT THE GOVERNMENT OWES
16 SOME KIND OF COMPENSATION OR REMEDY FROM THAT IS NOT
17 APPROPRIATE FOR INJUNCTIVE RELIEF.

18 WITH RESPECT TO ANY OBLIGATION POST
19 RELEASE --

20 THE COURT: A CLAIM FOR INTENTIONAL -- I
21 UNDERSTAND WHAT YOU'RE SAYING. APPARENTLY, THE CASE TO
22 WHICH YOU REFERRED IN MASSACHUSETTS MAY BE BRINGING
23 SUCH CLAIMS. I DON'T KNOW. BUT THOSE ARE TORT CLAIMS
24 FOR WHICH THERE CAN BE ECONOMIC DAMAGES. AND I SUPPOSE
25 THE ECONOMIC DAMAGES MIGHT INCLUDE THE COST OF

1 TREATMENT, PERHAPS, MAYBE.

2 MR. HEYSE: PRESUMABLY.

3 THE COURT: BUT IS THAT --

4 MR. HEYSE: THAT'S COMPENSATORY DAMAGES
5 DESIGNED TO MAKE THE INDIVIDUAL WHOLE.

6 THE COURT: OKAY.

7 MR. HEYSE: THE DIFFERENCE IS, THOSE ARE B(1)
8 AND (3) CASES OR A BIVENS CASE. NOT THIS. INJUNCTIVE
9 RELIEF REQUIRES CEASING SOME ONGOING ACTION OR TAKING
10 ACTION THAT ISN'T HAPPENING NOW THAT THE GOVERNMENT IS
11 OBLIGATED TO FULFILL.

12 PROVIDING CARE POST-RELEASE WITH NO
13 DEFINITION AND WITH NO EXPLANATION OF HOW IT'S PAID FOR
14 OR FROM WHOM --

15 THE COURT: SUPPOSE THAT THERE'S SOMEBODY WHO
16 IS DETAINED AND HE OR SHE IS EXAMINED AND SCREENED FOR
17 MENTAL HEALTH ISSUES BASED ON THE SEPARATION FROM HIS
18 OR HER CHILDREN OR CHILD. AND SUPPOSE THAT THE PERSON
19 WHO DOES THAT SCREENING CONCLUDES THAT THE FOLLOWING
20 PATH OF TREATMENT IS APPROPRIATE AND SHOULD START
21 IMMEDIATELY, AND IT STARTS IMMEDIATELY. AND THEN
22 SUPPOSE THAT PERSON IS RELEASED.

23 DOES THE GOVERNMENT NO LONGER HAVE ANY
24 OBLIGATION TO ASSURE THAT THE TREATMENT THAT HAS BEEN
25 RECOMMENDED CONTINUES?

1 MR. HEYSE: THAT'S PRECISELY WAKEFIELD. WHAT
2 WAS HAPPENING -- IT'S ACTUALLY A SLIGHT EXTENSION OF
3 WAKEFIELD INASMUCH AS WAKEFIELD INVOLVED A PORTABLE
4 PRESCRIPTION THAT SHOULD HAVE BEEN GIVEN TO THAT
5 INDIVIDUAL FOR ABOUT, I THINK, A TWO-WEEK PERIOD POST
6 RELEASE.

7 THE COURT: THE INDIVIDUAL HAD BEEN TAKING THE
8 PRESCRIPTIVE MEDICATION. AND THE ISSUE IS, WHETHER THE
9 INDIVIDUAL HAD TO BE PROVIDED WITH SOME OF THAT SAME
10 PRESCRIPTIVE DRUG WHEN THE INDIVIDUAL LEFT CUSTODY TO
11 TRANSITION TO HAVING ANOTHER SOURCE OF GETTING IT;
12 RIGHT?

13 MR. HEYSE: ANOTHER SOURCE OF GETTING IT,
14 THAT'S PRECISELY THE POINT.

15 WHAT PLAINTIFFS HAVE SUGGESTED HERE IS
16 THAT THE GOVERNMENT OWES A DUTY TO -- A DUTY OF CARE
17 UNTIL THEIR HARM IS REMEDIED, UNTIL IT IS CURED.
18 WAKEFIELD WAS TWO WEEKS WORTH OF PRESCRIPTION DRUGS.

19 NOW, PROVIDING -- IF THERE WAS A
20 TREATMENT -- ONGOING TREATMENT WHILE THE INDIVIDUAL IS
21 DETAINED, DHS POLICY PROVIDES A DISCHARGE PLAN FOR THAT
22 INDIVIDUAL. BUT IT'S UP TO THAT INDIVIDUAL, ONCE
23 THEY'RE IN THE COMMUNITY, TO OBTAIN CARE FOR
24 THEMSELVES. THAT'S THE ENTIRE POINT OF -- I BELIEVE
25 IT'S ESTELLE THAT TALKS ABOUT THE REASON THAT THE

1 GOVERNMENT OWES THE DUTY OF CARE IS BECAUSE THEY'RE
2 DETAINED, BECAUSE THEY'RE UNABLE TO PROVIDE THE CARE
3 FOR THEMSELVES. BUT ONCE THEY'RE RELEASED, THAT DUTY
4 DROPS OFF.

5 THE COURT: WELL, DOES -- AGAIN, BACK TO MY
6 HYPOTHETICAL AND WHAT YOU HAVE JUST STATED. IF THE
7 POLICY IS THAT THERE'S A TRANSITION PLAN TO WHERE THE
8 INDIVIDUAL CAN THEN PROVIDE -- FIND AN ALTERNATIVE
9 SOURCE OF CARE, GIVEN THE MEMBERS OF THIS CLASS, WOULD
10 THE GOVERNMENT DETERMINE WHETHER OR NOT THEY COULD FIND
11 AN ALTERNATIVE MEANS OF CARE?

12 MR. HEYSE: SHOULD THE GOVERNMENT BE
13 RESPONSIBLE OR --

14 THE COURT: WELL, IF THE GOVERNMENT'S PLAN
15 UPON RELEASE OF SUCH A PERSON IS, THEY DO NEED
16 CONTINUED CARE, AND WE'LL -- BUT THEY HAVE TO
17 TRANSITION TO GETTING IT, DOES THE GOVERNMENT HAVE NO
18 OBLIGATION TO FACILITATE THEIR GETTING IT GIVEN THAT,
19 FOR EXAMPLE, SOME OF THESE -- SOME OR MANY, IF NOT ALL,
20 OF THESE PEOPLE MAY NOT HAVE RESOURCES OR MEDICAL
21 INSURANCE?

22 MR. HEYSE: CERTAINLY. THE GOVERNMENT'S
23 OBLIGATION, IF ANY, IS EXTREMELY LIMITED, INASMUCH AS
24 THEY WERE NOT INVOLUNTARILY BROUGHT INTO THE
25 UNITED STATES.

1 IF THERE'S AN OBLIGATION OF CARE POST
2 RELEASE AS TO SOMETHING THAT THE GOVERNMENT CAUSED, IF
3 THE GOVERNMENT IS RESPONSIBLE FOR THEIR HARM, THAT'S A
4 BIVENS CASE. THAT'S A TORT CASE. THAT'S AN FTCA CASE.
5 THAT'S NOT INJUNCTIVE RELIEF.

6 PLUS, IT'S NOT ENDLESS.

7 ALSO, THROUGHOUT PLAINTIFF'S PLEADINGS,
8 WE SEE THAT THEY'RE ASKING FOR, QUOTE, "APPROPRIATE
9 CARE FROM NON-GOVERNMENT-PROVIDED INDIVIDUALS." NOW WE
10 HEAR TODAY THAT IT COULD BE PROVIDED, MAYBE, BY
11 GOVERNMENT INDIVIDUALS OR NOT.

12 THEY ALSO ASK THAT IT BE OUTSIDE OF
13 GOVERNMENT DETENTION FACILITIES BECAUSE THAT WILL NOT
14 BE EFFECTIVE TO THE TREATMENT.

15 AND AS YOUR HONOR POINTED OUT, HOW ARE
16 INDIVIDUALS THAT ARE NO LONGER IN THE UNITED STATES TO
17 RECEIVE TREATMENT?

18 THE COURT: LET ME ASK YOU THIS WITH RESPECT
19 TO YOUR BIVENS ARGUMENT: WHAT IS YOUR RESPONSE TO THE
20 PLAINTIFF'S ARGUMENT THAT, UNDER THIS HYPOTHETICAL,
21 THERE'S A PERSON WHO IS RELEASED FROM CUSTODY WHO HAS A
22 SERIOUS MEDICAL PROBLEM WHICH REQUIRES EXPENSIVE
23 MEDICATIONS. AND, INDEED, THAT MEDICAL PROBLEM WAS
24 CAUSED BECAUSE THIS PERSON WAS EXPOSED TO ANOTHER
25 PERSON DURING THE TIME OF CUSTODY, AND IT WAS THE

1 GOVERNMENT'S RESPONSIBILITY THAT THAT EXPOSURE
2 OCCURRED.

3 IF THE PERSON JUST HAS THE RIGHT TO BRING
4 A BIVENS CLAIM, BUT BY THE TIME THAT IS DONE, THE
5 PERSON MAY HAVE HAD SERIOUS HEALTH ISSUES OR EVEN DIED
6 BECAUSE THE PERSON COULDN'T GET THE NECESSARY
7 TREATMENT, IS THE BIVENS CLAIM REALLY THE ONLY REMEDY?

8 MR. HEYSE: ULTIMATELY, THE QUESTION IS, WHAT
9 COULD A COURT ORDER FACED WITH THAT TYPE OF CLAIM? IF
10 THERE'S SOME KIND OF PRELIMINARY RELIEF AVAILABLE, THAT
11 WOULD BE AN INJUNCTION ATTENDED TO A BIVENS CLAIM, TO
12 ESSENTIALLY COMPELLING ACTION BASED ON A LIKELIHOOD OF
13 SUCCESS ON THE MERITS, OR SOME KIND OF, I GUESS,
14 SPOILIATION OR PREVENTATIVE MEASURE.

15 WHAT'S IMPORTANT HERE IS THAT THE
16 RESOURCES PLAINTIFFS ARE AFTER ARE IN FACT AVAILABLE TO
17 THEM. THAT WAS ACTUALLY DIRECTLY DISCUSSED IN THE
18 MS. L. JOINT REPORT -- OR JOINT STATUS REPORT REQUEST
19 FOR A FUND, WAS THE AVAILABILITY OF \$25 MILLION WORTH
20 OF PRO BONO MENTAL HEALTH SERVICES. THE CLAIM IN
21 MS. L. WAS THAT THAT WAS GOING TO BE INADEQUATE. AND
22 THESE INDIVIDUALS SHOULDN'T -- OR THE PROVIDERS
23 SHOULDN'T BE EXPECTED TO BE PROVIDING THE PRO BONO
24 SERVICES THAT THEY ARE IN FACT VOLUNTEERING. SO IT WAS
25 ACTUALLY SEEKING COMPENSATION FOR THEM FOR SERVICES

1 THAT ARE AVAILABLE TO THESE INDIVIDUALS.

2 WE ALSO HAVE NO SUGGESTION HERE THAT
3 THESE INDIVIDUALS HAVE SOUGHT THIS TREATMENT OR HAVE
4 REQUESTED THAT THE -- THAT THE NAMED PLAINTIFF HERE,
5 THAT THEY HAVE AVAILED THEMSELVES OF THAT. THEY HAVE A
6 DUTY TO MITIGATE THE HARM --

7 THE COURT: SLOW DOWN.

8 MR. HEYSE: I APOLOGIZE, YOUR HONOR.

9 THEY HAVE A DUTY TO MITIGATE THE HARM
10 THAT THEY HAVE SUFFERED TO MINIMIZE DAMAGES TO THE
11 EXTENT THAT THEY ARE WAITING FOR SERVICES TO BE GIVEN
12 TO THEM WITHOUT EXPLAINING HOW THEY WANT IT.

13 THE COURT: WELL -- ALL RIGHT.

14 BUT, AGAIN, IN A HYPOTHETICAL, THESE
15 INDIVIDUALS WHO HAVE BEEN DETAINED FOR ALLEGEDLY
16 ILLEGALLY ENTERING THE COUNTRY AND NOT HAVING A BASIS
17 FOR SEEKING ASYLUM OR OTHER THINGS, YOUR EXPECTATION IS
18 THEN IS, THAT THEY WOULD BE ABLE TO NAVIGATE TO FIND A
19 PRO BONO SERVICE PROVIDER WITHOUT HAVING NECESSARILY AN
20 EVALUATION THAT TELLS THEM WHAT KIND OF SERVICES THEY
21 NEED?

22 MR. HEYSE: WELL, THAT'S -- AGAIN, THAT GETS
23 BACK TO WHAT IS DHS DOING FOR THEM?

24 IF THEY ARE KNOWN TO BE SUFFERING FROM
25 SOME KIND OF MENTAL HEALTH ISSUE THAT WAS MANIFESTED

1 WHILE THEY WERE IN CARE, WHETHER OR NOT IT WAS OBSERVED
2 BY DHS OR THEY AFFIRMATIVELY PUT THEIR HAND UP AND
3 SAID, "I NEED HELP."

4 I SEE THERE'S A PINK SLIP SITTING ON
5 COUNSEL'S TABLE HERE. THAT'S A FORM THAT A DETAINED
6 INDIVIDUAL CAN PROVIDE, CAN SUBMIT CONFIDENTIALLY
7 REQUESTING MORE CARE. SO WE DON'T HAVE ANY EVIDENCE OF
8 ANYTHING LIKE THAT WAS IGNORED.

9 BUT IN THE EVENT THAT THAT HAPPENED, THAT
10 INDIVIDUAL, PURSUANT TO DHS REGULATIONS, WOULD BE GIVEN
11 SOME KIND OF DISCHARGE PLAN. PRESUMABLY, THAT WOULD
12 INCLUDE REFERRALS TO LOCAL RESOURCES.

13 AND THIS, AGAIN, GETS TO THE DISTINCTION
14 BETWEEN THE PARENTS AND THE CHILDREN. THE O.R.R., THE
15 EXACT SAME THING, PROVIDES DISCHARGE PLANS. THERE'S A
16 WHOLE SLATE OF PROCEDURES IN WHICH THEY ENGAGE, AND
17 THEY REFER THESE INDIVIDUALS TO AVAILABLE PROVIDERS.

18 ALSO, SPECIFIC TO THESE INDIVIDUALS, THE
19 NAMED PLAINTIFFS HAVE COUNSEL THAT IS, OBVIOUSLY,
20 CAPABLE OF POINTING THEM IN THAT DIRECTION TO HELP
21 GUIDE THEM.

22 AS TO ABSENT CLASS MEMBERS, THAT MIGHT BE
23 A DIFFERENT STORY.

24 THE COURT: THERE ARE THREE NAMED PLAINTIFFS.

25 MR. HEYSE: RIGHT.

1 THE COURT: THERE'S ALLEGEDLY UP TO A THOUSAND
2 CLASS MEMBERS.

3 MR. HEYSE: RIGHT, ALLEGEDLY, OR SEVEN.

4 THE COURT: NO, I UNDERSTAND. I'VE ASKED THE
5 QUESTION. I UNDERSTAND.

6 MR. HEYSE: THE POINT BEING IS, THE RESOURCES
7 ARE OUT THERE. DOCTORS ARE OUT THERE. WHETHER OR NOT
8 AN INDIVIDUAL WITH A LANGUAGE ISSUE OR THAT HAS
9 SUFFERED SOME KIND OF TRAUMA WOULD KNOW TO SEEK THAT,
10 IT'S A QUESTION OF WHETHER OR NOT SERVICES WILL BE
11 FORCED UPON THEM OR THEY WILL ADHERE TO THEIR DUTY TO
12 MITIGATE THE DAMAGES THAT THEY CLAIM THEY SUFFERED.

13 I FEEL LIKE I'M CROSSING OVER BETWEEN THE
14 PRELIMINARY INJUNCTION AND CLASS ISSUES A BIT.

15 THE COURT: THEY DO OVERLAP.

16 MR. HEYSE: ABSOLUTELY.

17 THE THIRD QUESTION -- I BELIEVE I'VE
18 ADDRESSED THE FIRST TWO QUESTIONS YOUR HONOR HAD ABOUT
19 FIRST TO FILE RULE.

20 IF THERE ARE NO FURTHER QUESTIONS ON THAT
21 POINT?

22 WE WERE JUST DISCUSSING PROVIDING RELIEF
23 AFTER CUSTODY.

24 THERE WAS ONE OTHER CASE. I DON'T WANT
25 TO GET INTO THE MERITS OF THE MOTION TO DISMISS FILING,

1 BUT A CASE WE CITED IN THERE WAS CHARLES OUT OF THE
2 SOUTHERN DISTRICT OF NEW YORK THAT HESITATED TO EXTEND
3 WAKEFIELD ANY FURTHER, ESPECIALLY, IN PART, BECAUSE THE
4 ACTIONS THERE WERE NOT CONSCIENCE SHOCKING AND
5 DELIBERATELY INDIFFERENT TO THE HARM THAT WAS SUFFERED.
6 AND THAT'S A CRITICAL POINT HERE.

7 THE CONSTITUTIONALITY OF THE POLICY, THE
8 GOVERNMENT'S SEPARATION POLICY IS NOT BEFORE THIS
9 COURT. THAT IS THE QUESTION BEFORE MS. L.

10 WHAT'S BEFORE THIS COURT IS THE ALLEGED
11 HARM ARISING OUT OF THAT POLICY.

12 SO WHETHER OR NOT THE SEPARATION WAS
13 CONSCIENCE SHOCKING IS A SEPARATE QUESTION FROM WHETHER
14 OR NOT THE ALLEGED FAILURE TO PROVIDE TREATMENT WHILE
15 IN DETENTION AND AFTERWARDS, IS THAT CONSCIENCE
16 SHOCKING?

17 AND THE GOVERNMENT SUBMITS THAT THE
18 PROCEDURES IN PLACE THAT DHS EXECUTES BASED ON
19 FIRSTHAND EXPERIENCE IS NOT CONSCIENCE SHOCKING. IT IS
20 DELIVERED BY HUMANS, INDIVIDUALS THAT RECOGNIZE AND --
21 RECOGNIZE THEIR RESPONSIBILITY OF CARE FOR INDIVIDUALS
22 IN THEIR CUSTODY.

23 THE THIRD QUESTION YOUR HONOR RAISED WAS
24 ABOUT WHETHER OR NOT THESE PLAINTIFFS ARE SUITABLE TO
25 REPRESENT THE CLASS GIVEN THAT THEY HAVE BEEN RELEASED.

1 AGAIN, I THINK THAT SPEAKS FOR ITSELF, IS THAT THEY
2 LACK ANY INTEREST WHATSOEVER IN CONTINUING TO REPRESENT
3 INDIVIDUALS WHO ARE DETAINED, HOWEVER MANY THERE ARE.
4 WE BELIEVE THERE ARE ONLY TO BE SEVEN POTENTIAL CLASS
5 MEMBERS THAT REMAIN DETAINED. SO, REALLY, THE CASE
6 BECOMES ABOUT REPRESENTING INDIVIDUALS THAT ARE
7 RELEASED. AND THAT GETS BACK TO THE QUESTION OF
8 WHETHER OR NOT THERE IS A DUTY OF CARE.

9 THE COURT: GOING BACK TO THE DISTRICT COURT
10 DECISION IN CHARLES. DID YOU SAY THAT YOU THINK --
11 WHAT IS YOUR POSITION ON WHAT IT DID?

12 MR. HEYSE: THE COURT HESITATED TO EXTEND
13 WAKEFIELD. AGAIN, THAT'S A COURT NOT BOUND BY
14 WAKEFIELD. BUT THEY CONSIDERED WAKEFIELD, AND THEY
15 WERE GETTING INTO ALL THE ISSUES THAT ARE ESSENTIALLY
16 THE SAME ISSUES HERE. IT WAS THE MENTAL HEALTH ASPECTS
17 ATTENDANT TO IMMIGRATION DETENTION, AND DID THE
18 GOVERNMENT BEAR A BURDEN OF CARE POST RELEASE.

19 THE COURT: AND THEY WERE DIAGNOSED WITH
20 MENTAL HEALTH ISSUES. AND THEY WERE BEING TREATED FOR
21 THAT WHILE IN CUSTODY.

22 WEREN'T THEY PROVIDED WITH CERTAIN
23 POST-CUSTODY CARE CONSISTENT WITH THAT THAT THEY HAD
24 BEEN RECEIVING WHILE IN CUSTODY?

25 MR. HEYSE: THEY WERE -- I BELIEVE IN THAT

1 CASE THEY SHOULD HAVE, BUT DID NOT RECEIVE DISCHARGE
2 PLANS. IT WAS NOTED THERE THAT DHS, I THINK IN THE
3 INTERIM -- I'M TRYING TO REMEMBER THE EXACT FACTS OF
4 THE CASE. DHS HAD CHANGED ITS POLICY WITH RESPECT TO
5 DISCHARGE PLANS.

6 BUT THOSE INDIVIDUALS, HAVING HAD A
7 MENTAL HEALTH ISSUE DIAGNOSED, SHOULD HAVE -- AT A
8 MINIMUM, SHOULD HAVE RECEIVED --

9 THE COURT: WAS ONE OF THEM GIVEN A 12-MONTH
10 PLAN AND THE OTHER AN 8-MONTH PLAN?

11 MR. HEYSE: THAT SOUNDS ACCURATE, YOUR HONOR.

12 THE COURT: IS THAT INCONSISTENT WITH THE
13 RELIEF BEING SOUGHT HERE?

14 MR. HEYSE: THE ULTIMATE POINT -- THE
15 CONCLUSION THE COURT REACHED THERE WAS THAT THE FAILURE
16 TO PROVIDE THOSE PLANS -- I THINK IT WAS RECOMMENDED
17 THAT THEY SHOULD BE GIVEN THOSE PLANS AND DIDN'T. THE
18 FAILURE TO PROVIDE THOSE PLANS WAS NOT CONSCIENCE
19 SHOCKING. IT WAS NOT DELIBERATE INDIFFERENCE TO THEIR
20 CARE. SO, THUS, THE COURT DISMISSED THEIR COMPLAINT
21 ENTIRELY.

22 ALSO WORTH NOTING THAT THAT WAS A TORT
23 CASE.

24 WITH RESPECT TO THE CLASS ISSUES, I THINK
25 WE WERE BEGINNING TO TALK ABOUT WHETHER OR NOT THEY

1 WERE ADEQUATE REPRESENTATIVES. I THINK WE HAVE COVERED
2 THAT. IF YOUR HONOR HAS ANY FURTHER QUESTIONS?

3 THE COURT: I DON'T. THANK YOU.

4 MR. HEYSE: OKAY. AGAIN, COMPENSATORY DAMAGES
5 ARE EXTREMELY RARE IN INJUNCTIVE RELIEF CASES. THIS
6 AMOUNTS TO COMPENSATORY DAMAGES, ESPECIALLY INASMUCH AS
7 PLAINTIFFS CAN'T DEFINE EXACTLY WHAT IT IS THEY'RE
8 AFTER. WHAT BEHAVIOR ARE THEY SEEKING TO ENJOIN? AND
9 EVEN IF IT IS SPECIFIC TO DETENTION, HOW WILL THEY
10 BENEFIT FROM IT?

11 THE COURT: I DON'T THINK IT IS THAT THEY'RE
12 SEEKING DAMAGES.

13 ISN'T THE REQUEST FOR RELIEF THAT THEY BE
14 SCREENED AND THEN PROVIDED CARE, AND THAT THE COST OF
15 THE CARE BE COVERED BY THE GOVERNMENT AS OPPOSED TO
16 MONEY FLOWING TO THE PLAINTIFFS OR THE CLASS MEMBERS?

17 MR. HEYSE: IT'S NOT STRAIGHT CASH IN THEIR
18 POCKET, NO.

19 THE DIFFERENCE BEING, IN ORDER FOR THAT
20 LATTER STEP TO HAPPEN, THERE HAS TO BE SOME
21 CONSTITUTIONAL DUTY UNDERPINNING IT, A DUTY TO PROVIDE
22 THAT CARE. IF IT IS NOT A DUTY OF THE GOVERNMENT TO
23 PROVIDE CARE POST RELEASE, WHICH, AGAIN, GOES FAR
24 BEYOND WAKEFIELD, THAT'S COMPENSATORY DAMAGES. THAT IS
25 SIMPLY GOING BEYOND WHAT THE GOVERNMENT IS OBLIGATED TO

1 DO.

2 AND THAT'S NOT TO SAY THE GOVERNMENT
3 ISN'T OBLIGATED TO DO THAT IN THE EVENT THE GOVERNMENT
4 HAS CAUSED HARM, IF THAT'S PROVEN. BUT THAT'S A TORT
5 CASE OR A BIVENS CASE OR A FEDERAL TORT CLAIMS ACT
6 CASE, NOT AN INJUNCTION.

7 AGAIN, COMPENSATORY DAMAGES ARE DESIGNED
8 TO BE COMMENSURATE WITH THE INJURY SUFFERED. THAT'S
9 BLACK LETTER LAW FROM 1800 SUPREME COURT CASES.

10 ULTIMATELY, WHAT'S SOUGHT HERE IS --
11 AMOUNTS TO CREATIVE LAWYERING. AS THE SUPREME COURT
12 SAID IN GREAT WEST, "LAWYERLY INVENTIVENESS MAY ENABLE
13 ANY CLAIM TO BE PHRASED IN INJUNCTIVE TERMS." THAT'S
14 WHAT WE HAVE HERE.

15 MORE RECENTLY IN WAL-MART, THE COURT
16 EXPLAINED THAT FOR A B(2) ACTION TO PROCEED, THE ENTIRE
17 CLASS MUST BENEFIT OR NONE. AND WHAT WE HAVE HERE IS A
18 AN INCREDIBLE MIXED BAG OF WHO MAY BE BENEFIT FROM THIS
19 RELIEF SOUGHT AND HOW IT WOULD BE ADMINISTERED.

20 YOUR HONOR HINTED EARLIER TO THE
21 REMARKABLE LOGISTICS INHERENT IN DELIVERING MENTAL
22 HEALTH SERVICES TO SOMEONE OUTSIDE OF THE UNITED
23 STATES. HOW IS THAT EVEN POSSIBLE? IT'S LITERALLY
24 DIFFICULT TO CONTEMPLATE.

25 THE COURT: LET'S PUT ASIDE THOSE WHO ARE

1 OUTSIDE THE UNITED STATES BECAUSE, AGAIN, THAT COULD --
2 THAT COULD BE ADDRESSED BY THE CLASS DEFINITION,
3 COULDN'T IT?

4 MR. HEYSE: IT COULD. THEY COULD REDEFINE THE
5 CLASS OR --

6 THE COURT: IF THE ISSUE IS WHAT TREATMENT
7 IS -- A SCREENING TO DETERMINE WHAT TREATMENT IS
8 APPROPRIATE, THERE MAY BE CERTAIN CLASS MEMBERS WHERE
9 IT'S DETERMINED NO TREATMENT NEEDED.

10 MR. HEYSE: YES.

11 THE COURT: AND -- OKAY.

12 MR. HEYSE: THERE'S ALSO THE ISSUE OF WHETHER
13 OR NOT SOME CLASS MEMBERS OR PROPOSED CLASS MEMBERS
14 DON'T WANT WHAT THESE PLAINTIFFS ARE AFTER. AND
15 THAT'S, AGAIN, K.O., THE DISTRICT COURT CASE IN
16 MASSACHUSETTS WHERE THEY'RE SEEKING MONEY DAMAGES.
17 PRECISELY SHOWS THAT THERE IS STRONG POTENTIAL FOR
18 ANTAGONISM. WHY DIDN'T THEY SEEK THIS RELIEF IN
19 MS. L.?

20 OR THEY HAVE AND WHY HAVEN'T THEY BETTER
21 PURSUED IT?

22 THERE'S CLEAR ANTAGONISM BETWEEN WHAT
23 THESE INDIVIDUALS ARE AFTER. SO HOW CAN THESE
24 INDIVIDUALS PURPORT TO REPRESENT THIS MASSIVE CLASS --

25 THE COURT: WHAT'S THE ANTAGONISM? I'M NOT

1 FOLLOWING THAT.

2 YOU'RE SAYING BECAUSE THEY DON'T SEEK
3 MONETARY RELIEF?

4 MR. HEYSE: AS YOUR HONOR SUGGESTED, AND AS --
5 THE CONFUSION IN TERMS OF EXACTLY WHAT THEY'RE AFTER
6 DISPLAYS THAT THERE IS STRONG POTENTIAL FOR ANTAGONISM
7 BETWEEN ALL OF THESE CLASSES. YOU HAVE INDIVIDUALS --
8 THE MS. L. INDIVIDUALS HAVE -- MAYBE REQUESTED HARM --
9 A FUND TO TREAT MENTAL HEALTH. THE K.O. CASE, THEY'RE
10 EXPRESSLY SEEKING MONETARY DAMAGES. THEY WANT MONEY TO
11 COMPENSATE THEM FOR HARM THEY ALLEGEDLY SUFFERED AS A
12 RESULT OF THE FAMILY SEPARATION POLICY AND DENIAL OF
13 CARE WHILE DETAINED.

14 AND WE HAVE, HERE, A REQUEST FOR AN
15 INJUNCTION TO PROVIDE THE CARE THAT IS SOUGHT IN K.O.,
16 BUT WITHOUT A DIRECT MONEY EXCHANGE. BUT THAT GETS
17 BACK TO THE POINT OF HOW? HOW IS THAT CARRIED OUT?
18 AND YOUR HONOR WAS ASKING WOULD A VOUCHER SYSTEM WORK
19 OR --

20 THE COURT: I WAS ASKING A HYPOTHETICAL ABOUT
21 WHY THAT WAS NOT DIFFERENT.

22 MR. HEYSE: SURE.

23 IT'S LOGISTICALLY, EXTREMELY COMPLICATED;
24 BUT ALSO DEMONSTRATES THAT THEY DON'T ALL WANT THE SAME
25 THINGS. SO IF THEY'RE GOING TO REPRESENT INDIVIDUALS

1 HERE THAT DON'T WANT THIS CARE -- THERE'S INDIVIDUALS
2 THAT MIGHT NOT NEED THE CARE. THERE'S INDIVIDUALS
3 THAT, PERHAPS, NEEDED THE CARE AT SOME TIME, BUT NOW
4 THEY'RE NOT IN NEED OF CARE. THERE'S JUST SIMPLY A
5 WIDE VARIETY OF -- THERE'S ALSO INDIVIDUALS -- AND THAT
6 GETS BACK TO THE COMMONALITY ISSUES AND ADEQUACY ISSUES
7 AS TO THE INCREDIBLY DIFFERENT IN NATURE OF THE HARMS
8 THAT THEY SUFFERED BEFORE THEY GOT HERE. THESE ARE
9 INDIVIDUALS THAT WERE FLEEING THEIR HOMES FROM
10 THOUSANDS OF MILES AWAY. THAT IN AND OF ITSELF IS A
11 BIG DEAL. THAT AN INDIVIDUAL IS LEAVING THEIR HOME
12 SOMEPLACE THEY, PRESUMABLY, HAVE NEVER LEFT BEFORE,
13 LEAVING EVERYTHING BEHIND AND COMING TO A FOREIGN
14 COUNTRY WHERE THEY, PRESUMABLY, DON'T SPEAK THE
15 LANGUAGE, EXPERIENCING A DIFFICULT JOURNEY ALONG THE
16 WAY, THAT'S NOT TO BE DISCOUNTED. BUT IT ALL PLAYS
17 INTO WHAT HARM ARE THEY SUFFERING NOW? THAT GETS BACK
18 TO WHAT KIND OF CARE DO THEY NEED? THAT GOES BEYOND A
19 SCREENING. A SCREENING WOULD BE A RELATIVELY SIMPLE
20 THING TO DO. AGAIN, DO THEY HAVE STANDING TO SEEK
21 THAT? THAT'S A DIFFERENT QUESTION.

22 BUT GOING BEYOND THAT IS WHAT THIS CASE
23 IS ABOUT. THIS CASE IS ABOUT MORE THAN JUST MENTAL
24 HEALTH SCREENINGS. THIS IS ABOUT, QUOTE, "APPROPRIATE
25 CARE" PROVIDED TO THESE INDIVIDUALS WITH NO END IN

1 SIGHT AND NO EXPLANATION OF HOW IT IS TO BE PROVIDED,
2 BY WHOM OR WHERE OR FOR HOW MUCH.

3 THE COURT: WELL, IF THE SCREENING -- IF A
4 SCREENING OCCURS, AND IT'S DETERMINED THAT A CERTAIN
5 PROTOCOL IS APPROPRIATE, AND THE PERSON REMAINS IN
6 CUSTODY, THEN I ASSUME THAT THE APPROPRIATE CARE WOULD
7 BE PROVIDED; CORRECT?

8 MR. HEYSE: CORRECT. DHS'S POSITION IS THAT
9 THE CARE --

10 THE COURT: AND IF A SCREENING OCCURRED AND IT
11 WERE DETERMINED THAT, POST RELEASE FOR SOME TRANSITION
12 PERIOD, SOME CARE WERE APPROPRIATE, THAT MIGHT BE
13 PROVIDED BY THE GOVERNMENT, IS THAT RIGHT, UNDER THE
14 STANDARD PRACTICE?

15 MR. HEYSE: THE GOVERNMENT IN THAT INSTANCE
16 WOULD BE PROVIDING A DISCHARGE PLAN. ACTUAL DIRECT
17 PROVISION OF SERVICES IS NOT AUTHORIZED BY STATUTE.

18 THE COURT: BUT IF THE INJUNCTIVE RELIEF WERE,
19 HYPOTHETICALLY, LIMITED TO SCREENING, THEN THE ISSUE OF
20 WHAT CARE MIGHT LATER BE PROVIDED UPON RELEASE COULD
21 BE -- MIGHT BE SEPARATELY ADJUDICATED, IF AT ALL?

22 MR. HEYSE: SEPARATELY ADJUDICATED IN TERMS OF
23 A TORT CASE OR --

24 THE COURT: WELL, COULD BE. I MEAN, I DON'T
25 KNOW. BUT I DON'T KNOW -- I'M COMING BACK TO THE POINT

1 THAT, WITH RESPECT TO INDIVIDUALIZED DETERMINATIONS,
2 WHICH IS PART OF THE RULE 23 ANALYSIS, I UNDERSTAND
3 YOUR COMMENT THAT DIFFERENT PEOPLE HAVE DIFFERENT
4 BACKGROUNDS, CAME FROM DIFFERENT PLACES AND MAY,
5 THEREFORE, HAVE UNIQUE CHARACTERISTICS TO PRESENT TO
6 THE SCREENER. BUT I DON'T KNOW THAT THE FACT THAT
7 EVERYBODY WOULD BE SCREENED IS SO DIFFERENT. EVERYONE
8 WOULD -- THE SCREENER WOULD EVALUATE ALL OF THAT.

9 MR. HEYSE: YES.

10 IT GETS TO THE POINT OF WHY? IF THEY'RE
11 TO BE SCREENED -- IF A MENTAL HEALTH ISSUE IS TO BE
12 IDENTIFIED, THEN WHAT? THAT'S THE --

13 THE COURT: HAVE YOU PRESENTED THIS PINK SLIP
14 AS PART OF THE SUBMISSIONS?

15 MR. HEYSE: WE ACTUALLY JUST OBTAINED THAT
16 YESTERDAY.

17 THE COURT: COULD I SEE THAT?

18 MR. HEYSE: CERTAINLY.

19 THE COURT: IS THAT PROVIDED, BY THE WAY, IN
20 MORE THAN ONE LANGUAGE TO THOSE WHO ARE --

21 MR. HEYSE: IT'S IN SPANISH ON THE BACK.

22 THE COURT: THANK YOU.

23 HAVE YOU SEEN THIS?

24 MR. FEE: WE HAVE NOT SEEN IT.

25 MR. HEYSE: I CAN GIVE YOU A COPY, IF YOU

1 WOULD LIKE.

2 WHEN WE VISITED -- THAT'S FROM THE JAMES
3 A. MUSICK FACILITY WHERE ONE OF THE NAMED PLAINTIFFS
4 WAS DETAINED. WE VISITED THAT FACILITY YESTERDAY TO
5 SEE FOR OURSELVES WHAT IS GOING ON THERE. AND IT WAS,
6 NOT TO OVERSTATE THINGS, AN IMPRESSIVE OPERATION. THEY
7 HAVE A WELL-MANAGED, WELL-OILED MACHINE THERE THAT HAS
8 MEN AND WOMEN SEPARATED.

9 THE COURT: IS THIS A PRIVATE --

10 MR. HEYSE: THAT GOES INTO A BOX.

11 THE COURT: NO.

12 THE INSTITUTION THAT GENERATED THIS FORM,
13 IS THAT A GOVERNMENT INSTITUTION OR A PRIVATE --

14 MR. HEYSE: IT'S AN ORANGE COUNTY OPERATED
15 FACILITY THAT HOUSES DHS DETAINEES.

16 THE COURT: OKAY. ALL RIGHT. THANK YOU.

17 MR. HEYSE: AT THAT FACILITY THERE ARE --

18 THE COURT: COULD YOU FILE THAT ON THE DOCKET,
19 PLEASE?

20 MR. HEYSE: SURE.

21 THE COURT: WE'RE GOING TO MAKE A COPY SO I
22 HAVE IT.

23 JUST FILE IT ON THE DOCKET

24 MR. HEYSE: WILL DO, YOUR HONOR.

25 THE COURT: THANK YOU.

1 MR. HEYSE: I WAS HESITANT TO PRESENT EVIDENCE
2 AT A PRELIMINARY INJUNCTION HEARING. BUT THE POINT IS
3 THAT, WE TALKED WITH THEM THERE. AND THE PROCEDURES
4 THAT ARE DESCRIBED BY THE PLAINTIFFS SIMPLY DON'T MATCH
5 WITH THEIR EXPERIENCE. EVEN SPECIFIC TO -- I BELIEVE
6 IT WAS J.P. THAT WAS DETAINED AT MUSICK BRIEFLY. SHE
7 DISPLAYED NO OUTWARD SIGNS OF MENTAL HEALTH ISSUES.
8 SHE WAS ASKED ABOUT THOSE MENTAL HEALTH ISSUES. IF SHE
9 WAS SUFFERING AND WANTED TO RAISE THAT CONCERN
10 CONFIDENTIALLY, SHE HAD THIS SLIP MADE AVAILABLE TO
11 HER.

12 THERE WAS ALSO WHAT THEY DESCRIBED --
13 "THEY" BEING THE DETENTION OFFICERS AND THE INDIVIDUALS
14 WITH WHICH WE SPOKE. THEY TALKED ABOUT HOW THERE'S A
15 COLLEGIAL ATMOSPHERE AMONG THE DETAINEES. THAT IF ONE
16 INDIVIDUAL IS SUFFERING, THEY'LL SAY SOMETHING.
17 SOMEONE WILL SAY SOMETHING.

18 THE COURT: I DON'T -- YOU'RE RIGHT. I DON'T
19 HAVE EVIDENCE ON THIS.

20 DO YOU HAVE ANY DATA CONCERNING HOW MANY
21 OF THESE PINK SLIPS WERE SUBMITTED?

22 MR. HEYSE: WE DON'T.

23 WE'RE IN THE PROCESS OF COLLECTING ALL
24 AVAILABLE INFORMATION TO COMPLY WITH THE DISCOVERY THAT
25 IS ONGOING.

1 ULTIMATELY, THE POINT IS, IS AN
2 INJUNCTION NECESSARY HERE? IS THERE A LIKELIHOOD OF
3 SUCCESS ON THE MERITS? AND TO WHAT END? WHAT HARM IS
4 GOING TO BE CURED HERE OR PREVENTED? WHAT BEHAVIOR IS
5 GOING TO BE CEASED?

6 ULTIMATELY, THEY'RE ASKING FOR DAMAGES.
7 IT MIGHT BE DESCRIBED AS AN INJUNCTION, BUT IT IS
8 ULTIMATELY COMPENSATORY DAMAGES. THAT IS INAPPROPRIATE
9 FOR A PRELIMINARY INJUNCTION, AS WELL AS A B(2) CLASS
10 MOTION.

11 NO FURTHER QUESTIONS?

12 THE COURT: NO. THANK YOU, MR. HEYSE.

13 IS THERE ANYTHING NEW FROM THE
14 PLAINTIFF'S SIDE?

15 MR. FEE: YES, YOUR HONOR.

16 THE COURT: GO AHEAD, MR. FEE.

17 MR. FEE: YOUR HONOR, I WOULD JUST LIKE TO
18 RESPOND TO A FEW OF THE THINGS THAT MR. HEYSE HAD
19 MENTIONED.

20 FIRST, STARTING WITH THIS PINK SLIP,
21 WHICH WE'RE, OBVIOUSLY, JUST LOOKING AT FOR THE FIRST
22 TIME, BUT THIS IS REALLY VERY MUCH IN LINE WITH THE
23 OTHER EVIDENCE THAT WAS SUBMITTED HERE, WHICH IS TO
24 SAY, IT'S EVIDENCE OF GENERALIZED -- THE EXISTENCE OF
25 SORT OF GENERALIZED MEDICAL CARE. NOTHING ABOUT IT IS

1 TRAUMA INFORMED. NOTHING ABOUT IT IS SPECIFIC. THIS
2 IS VERY MUCH LIKE -- IT'S ACTUALLY EVEN LESS DETAILED
3 THAN THE FORM THAT WE ALREADY ADDRESSED AND OUR EXPERTS
4 ADDRESSED IN THE PAPERS.

5 THERE ARE CERTAIN PROFESSIONAL STANDARDS,
6 YOUR HONOR, THAT ARE EXPLAINED IN THE DECLARATIONS WE
7 SUBMITTED FOR HOW TO DIAGNOSE AND TREAT TRAUMA.

8 GIVING A PERSON A FORM ON DAY 1 THAT
9 LOOKS LIKE THE FORM THAT WAS IN THE PAPERS, AND THIS
10 SORT OF HALF-FORM THAT WE'VE GOT TODAY, IS BY NO MEANS
11 A SUBSTITUTE FOR THAT KIND OF VERY SPECIFIC RELIEF.

12 AND I WOULD JUST POINT YOUR HONOR TO THE
13 DECLARATION SUBMITTED WITH OUR REPLY.

14 THE COURT: I UNDERSTAND. I DON'T HAVE ANY
15 EVIDENCE ON THIS YET WITH RESPECT TO THIS FORM.

16 MR. FEE: SURE.

17 AND -- BUT, YOUR HONOR, JUST TO BE CLEAR,
18 YOU DO HAVE EVIDENCE ON --

19 THE COURT: I HAVE EVIDENCE -- I DON'T HAVE
20 EVIDENCE ON THE PINK FORM AND HOW IT WAS USED AND
21 WHETHER IT WAS STEP 1 TO SOME OTHER MORE THOROUGH
22 ANALYSIS. I DON'T KNOW.

23 MR. FEE: WHAT WE HAVE PUT IN OUR RECORD IS
24 THAT, NONE OF OUR CLIENTS RECEIVED THESE MENTAL HEALTH
25 SERVICES.

1 AND, FRANKLY, THE AFFIRMATIVE EVIDENCE
2 THAT WAS SUBMITTED BY THE GOVERNMENT ONLY UNDERSCORES
3 THAT THE KIND OF SPECIFIC TRAUMA INFORMED SERVICES
4 THAT'S NECESSARY TO TREAT THIS HARM WAS NEVER PROVIDED.
5 IT SIMPLY WAS NEVER PROVIDED. THERE'S NOTHING IN THE
6 RECORD THAT SUGGESTS THAT IT WAS. THERE'S, YOU KNOW,
7 "WE HAVE DOCTORS." THERE'S NOTHING THAT SUGGESTS THAT
8 WHAT MR. SPRINSON AND DR. HILDALGO AND ALL OF OUR
9 EXPERTS WHO ARE AT THE TOP OF THEIR FIELD HAVE
10 EXPLAINED ARE THE BARE MINIMUM FOR THE TREATMENT OF
11 THIS KIND OF HARM.

12 THERE WAS A DECLARATION THAT WAS ALSO
13 SUBMITTED ON THE DOCKET LAST NIGHT THAT'S SIMILAR. THE
14 EVIDENCE THAT WE SUBMITTED SAYS THAT, FIRST OF ALL, YOU
15 HAVE TO HAVE PROVIDERS WHO ARE TRAINED IN THESE KINDS
16 OF VERY SPECIFIC TRAUMA-INFORMED SERVICES. AND THEN
17 THEY HAVE TO PROVIDE THESE VERY SPECIFIC SERVICES.

18 THE COURT: YOU'RE TALKING ABOUT DOCKET 136-1?

19 MR. FEE: YES.

20 THE COURT: I HAVE THAT.

21 MR. FEE: AND THIS IS ANOTHER, I THINK, GOOD
22 EXAMPLE OF WHY IT'S CLEAR FROM THE RECORD THAT THE KIND
23 OF SERVICES THAT WE'RE SEEKING ARE NOT PROVIDED. THIS
24 IS ESSENTIALLY IDENTICAL TO THE FIRST DECLARATION FROM
25 THIS INDIVIDUAL --

1 THE COURT: NO, I UNDERSTAND.

2 MR. FEE: -- MR. DE LA CRUZ.

3 AND THE FIRST THING --

4 THE COURT: I'VE REVIEWED THIS.

5 MR. FEE: LET ME JUST POINT YOU TO --

6 THE COURT: THE ONLY CHANGES TO THIS THAT I'VE
7 NOTICED ARE AT PARAGRAPHS 15 AND 16 FROM WHAT WAS
8 PREVIOUSLY SUBMITTED.

9 MR. FEE: THAT'S RIGHT.

10 AND THERE'S NOTHING IN HERE ABOUT HAVING
11 TRAUMA-INFORMED SERVICE TRAINING. I SUSPECT THAT IF HE
12 DID, IT WOULD BE IN THERE. THERE'S NOTHING ABOUT THE
13 SPECIFIC SERVICES, THEIR TRAUMA-INFORMED SERVICES THAT
14 HE PROVIDED TO OUR CLIENTS OR ANY CLASS MEMBERS.

15 AND, AGAIN, I SUSPECT, IF HE HAD, WE
16 WOULD SEE IT BECAUSE THE ROAD MAP TO THOSE KINDS OF
17 SERVICES WAS LAID OUT IN GREAT DETAIL IN OUR EXPERTS'
18 DECLARATIONS.

19 AND, YOU KNOW, I WOULD ALSO POINT TO THE
20 FACT THAT, IN THIS DECLARATION THAT WAS SUBMITTED LAST
21 NIGHT, IT ACTUALLY, IF ANYTHING, DEMONSTRATES THAT THE
22 GOVERNMENT DOESN'T FOLLOW THEIR OWN POLICIES. I MEAN,
23 ON PAGE 5 OF THE DECLARATION, IT STATES THAT -- AND
24 PARAGRAPH 11, ONE OF THE CHILDREN, FOR INSTANCE, WAS
25 REPORTEDLY ABUSED BY A STRANGER IN HER HOME COUNTRY AND

1 WAS ROBBED DURING THE JOURNEY TO THE UNITED STATES.

2 AND THEN IF YOU FLIP LATER TO PAGE 6, IT
3 EXPLAINS WHEN DETAINED INDIVIDUALS MEET THE CRITERIA
4 FOR A HOME STUDY. AND THEN FOOTNOTE 1, IT SAYS, THAT
5 ONE OF THE CRITERIA FOR A HOME STUDY IS THAT THE CHILD
6 HAS BEEN A VICTIM OF PHYSICAL OR SEXUAL ABUSE UNDER
7 CIRCUMSTANCES THAT INDICATE THAT THE CHILD'S HEALTH OR
8 WELFARE HAS BEEN SIGNIFICANTLY HARMED OR THREATENED.

9 AND THEN BACK UP TO THE TEXT, IT SAYS,
10 "THAT MY REVIEW OF THE RECORDS INDICATES THAT ALL THESE
11 CHILDREN WERE RELEASED WITHOUT A HOME STUDY."

12 THE COURT: "MY REVIEW OF THE RECORDS
13 INDICATES THAT NONE OF THESE THREE CHILDREN MET THE
14 CRITERIA FOR HOME STUDY," CLOSED QUOTE. I SEE THAT.

15 MR. FEE: IT'S INTERNALLY INCONSISTENT.

16 AS YOU KNOW, YOUR HONOR, THE RECORD AND
17 THE MEDIA IS FULL OF EVIDENCE OF THE SERVICES AT THESE
18 DETENTION FACILITIES BEING BLASTED AS BEING INADEQUATE.

19 YOUR HONOR, FROM WHAT I HEARD FROM THE
20 GOVERNMENT A MOMENT AGO IS ESSENTIALLY A CONSTRUCT THAT
21 REALLY PROVIDES LITTLE TO NO LIMIT ON WHAT THE
22 GOVERNMENT CAN DO TO THESE PEOPLE WHILE THEY'RE IN
23 CUSTODY AS LONG AS THEY'RE RELEASED QUICKLY ENOUGH.

24 I MEAN, AS I UNDERSTAND IT, THERE'S -- AS
25 LONG AS THE PERSON -- EVEN IF THE GOVERNMENT INFLICTS

1 AN INTENTIONAL HARM, INTENTIONALLY HARMS THE PERSON
2 WHILE IN CUSTODY, AS LONG AS THEY'RE RELEASED BY THE
3 TIME IT -- AND DOESN'T AVAIL THEMSELVES OF KNOWLEDGE OF
4 THE HARM THAT WAS CAUSED BY SIMPLY NOT TALKING TO THE
5 PERSON ABOUT IT, THEN AS LONG AS THE PERSON IS RELEASED
6 BY THE TIME YOU GET TO COURT, THE GOVERNMENT NO LONGER
7 HAS A DUTY BECAUSE THE PERSON HAS BEEN RELEASED. AND
8 THE GOVERNMENT CAN RELY ON THE FACT THAT HE DIDN'T ASK
9 HIM ABOUT THEIR MENTAL HEALTH ILLNESSES TO SAY THAT
10 THEY DON'T KNOW.

11 NOW, ALL OF THIS IGNORES THE CRUCIAL
12 SECOND PART OF OUR RELIEF, WHICH IS -- AND THE PART
13 THAT REALLY WAS IGNORED THROUGHOUT THE PAPERS AND IN
14 THE ARGUMENT TODAY, WHICH IS THE STATE CREATED DANGER
15 DOCTRINE.

16 THE COURT: YOU MADE THIS POINT EARLIER.

17 MR. FEE: RIGHT.

18 BUT I THINK THAT'S THE KEY ADDITIONAL
19 DISTINCTION. FRANKLY, THAT'S ALSO PART OF WHAT
20 DISTINGUISHES OUR CASE FROM MS. L. AND IT'S AN
21 ENTIRE -- IT'S NOT ONLY A SEPARATE REMEDY AS THE
22 GOVERNMENT SUGGESTED. IT'S AN ENTIRELY SEPARATE
23 CONSTITUTIONAL VIOLATION. TWO DIFFERENT DUE PROCESS
24 INTERESTS THAT WERE NOT AT ISSUE IN MS. L. IT'S A
25 SEPARATE CLAIM. IT'S NOT MERELY SEPARATE AND DIFFERENT

1 RELIEF. IT'S A FUNDAMENTALLY SEPARATE CLAIM, A
2 SEPARATE INTEREST. AND IT'S A SEPARATE CASE.

3 NOW, ON THE -- I WON'T SAY MUCH ABOUT THE
4 MONEY DAMAGES ISSUE. I WOULD JUST POINT THE COURT TO
5 THE BOWEN CASE AND OUR DISCUSSION OF THAT IN THE
6 PAPERS.

7 IT'S NOT MERELY COMPENSATORY RELIEF.
8 IT'S -- IT'S MONEY DAMAGES. THIS IS NOT A MONEY
9 DAMAGES CASE. WE ASKED FOR PROVISION OF SERVICES.
10 JUST AS YOU CAN -- YOU KNOW, THERE WAS A STATEMENT THAT
11 YOU CAN PHRASE ANYTHING AS INJUNCTIVE RELIEF. YOU CAN
12 PHRASE ANYTHING AS MONETARY RELIEF TOO.

13 THE COURT: YOU'RE TALKING ABOUT THE DIRECTIVE
14 THAT THE UNITED STATES FUND A STATE MEDICAL PROCESS AS
15 REQUIRED BY STATUTE?

16 MR. FEE: I'M -- IN THE BOWEN CASE?

17 THE COURT: YES.

18 MR. FEE: I'M TALKING ABOUT THE DEFINITION
19 THERE FOR MONETARY RELIEF UNDER SECTION 702, WAIVER OF
20 SOVEREIGN IMMUNITY.

21 IT'S NOT MERELY COMPENSATORY RELIEF.
22 IT'S MONETARY RELIEF.

23 AND AS IT STATES IN BOWEN, IF IT'S AN
24 INJUNCTION -- IF THEY SEEK INJUNCTIVE RELIEF, EVEN IF
25 THAT INJUNCTIVE RELIEF HAPPENS TO INCLUDE THE PAYMENT

1 OF MONEY, WHICH OUR CASE DOES NOT, IT IS WITHIN THE
2 WAIVER, AND IT IS APPROPRIATE.

3 NOW, I DO BELIEVE THAT THERE ARE A COUPLE
4 OF CLASS CERTIFICATION RELATED ARGUMENTS THAT WE'D LIKE
5 TO RESPOND TO, YOUR HONOR. AND I'D LIKE TO PASS THOSE
6 OFF TO MY COLLEAGUE, MR. BROWN.

7 THE COURT: THE STATE CREATED DANGER DOCTRINE,
8 ISN'T THAT ORDINARILY APPLIED WITH RESPECT TO DANGER
9 CREATED BY THIRD PARTIES, NOT THE GOVERNMENT, SUCH AS
10 THE WITNESS WHO WAS BROUGHT HERE WAS SUBJECT TO RISK BY
11 THOSE AGAINST WHOM THE WITNESS MIGHT BE TESTIFYING?

12 MR. FEE: IT IS, YOUR HONOR.

13 BUT THERE'S NO MEANINGFUL BASIS THAT I
14 COULD SEE WHY A RISK THAT IS CREATED BY A GOVERNMENT
15 HARM SHOULD BE SUBJECTED TO A LOWER STANDARD THAN THE
16 THIRD PARTY. I THINK THAT THE STATE CREATED DANGER
17 DOCTRINE MERELY SHOWS THAT THE SCOPE OF DUE PROCESS
18 GUARANTEES IS QUITE A BIT BROADER THAN WHAT IS
19 NECESSARY IN THIS CASE.

20 THE COURT: OKAY. ALL RIGHT. THANK YOU,
21 MR. FEE.

22 MR. FEE: THANK YOU, YOUR HONOR.

23 THE COURT: MR. BROWN?

24 MR. BROWN: YOUR HONOR, I'LL BE VERY BRIEF. I
25 JUST HAVE TWO QUICK FOLLOW-UP POINTS.

1 THE FIRST IS ON THE ISSUE OF POTENTIALLY
2 CREATING A SUBCLASS OF DETAINED MEMBERS. I THINK IT
3 MAY NOT BE INSTRUCTIVE, AND IT IS CERTAINLY NOT
4 NECESSARY. A TRAUMA-INFORMED MENTAL HEALTH SCREENING
5 IS A STRAIGHTFORWARD REQUEST.

6 FOR EXAMPLE, I GET THE DIFFICULTY WITH
7 CONTEMPLATING WHAT FORM OF RELIEF THIS MAY TAKE. BUT,
8 FOR EXAMPLE, IN MS. L., JUDGE SABRAW DID NOT KNOW HOW
9 THE GOVERNMENT WAS GOING TO REUNITE DEPORTED CLASS
10 MEMBERS OR SEPARATED CLASS MEMBERS WHEN JUDGE SABRAW
11 ORDERED REUNIFICATION. BUT REUNIFICATION WAS A
12 STRAIGHTFORWARD REQUEST THAT COULD AND SHOULD AND WAS
13 ORDERED ON A CLASS-WIDE BASIS.

14 RELATEDLY, MEDICAL MONITORING IS A
15 WELL-RECOGNIZED FORM OF RELIEF THAT HAS BEEN ORDERED ON
16 A CLASS-WIDE BASIS.

17 ANOTHER EXAMPLE OF SIMILAR RELIEF WOULD
18 BE AN INADEQUATE INTERPRETATION OF INSURANCE BENEFITS.
19 IN SUCH A CASE WHEN -- IF IT WAS FOUND THAT THE
20 DETERMINATION WAS IMPROPER, THE COURT WOULD BE ABLE TO
21 ORDER INJUNCTIVE RELIEF AND ORDER THAT THE INSURANCE
22 COMPANY TO REPROCESS THE CLAIM UNDER THE CORRECT
23 STANDARD. AND THAT IS INJUNCTIVE RELIEF AND NOT
24 COMPENSATORY RELIEF.

25 SIMILAR TO THAT, A TRAUMA-INFORMED MENTAL

1 HEALTH SCREENING IS NO DIFFERENT. AND DEFENDANTS ADMIT
2 THAT SUCH A SCREENING IS SIMPLE. I WILL REFERENCE A
3 HYPOTHETICAL THAT MY COLLEAGUE MENTIONED EARLIER. AND
4 THAT IS, IF YOU WERE TO CONSIDER A GROUP OF WOMEN AND
5 CHILDREN WHO WERE DETAINED AND EXPOSED TO HEPATITIS C,
6 AND THE PURPOSE OF THIS EXPOSURE WAS TO DETER THESE
7 WOMEN AND CHILDREN FROM COMING TO THE UNITED STATES,
8 AND THEN THEY WERE RELEASED AND NOT APPROPRIATELY
9 SCREENED OR TREATED FOR HEPATITIS, NOW ALL OF THESE
10 WOMEN AND CHILDREN WOULD NEED AND DESERVE APPROPRIATE
11 HEALTH SCREENINGS AND TREATMENT IMMEDIATELY. IT WOULD
12 BE VERY IMPORTANT. AND IT WOULD BE UNCONSCIONABLE TO
13 DELAY THE SCREENING AND TREATMENT OF WOMEN AND CHILDREN
14 WHO HAD BEEN RELEASED SIMPLY BECAUSE TREATING THEM AND
15 FINDING THEM WOULD BE DIFFICULT.

16 THIS CASE IS NOT DIFFICULT. THE MENTAL
17 HARM THE FAMILIES HAVE SUFFERED IS REAL, YOUR HONOR.
18 AND IT SHOULD BE REMEDIED ON A CLASS-WIDE BASIS.

19 MY SECOND POINT IS, TO THE EXTENT THAT
20 DEFENDANTS ARE NOW ARGUING, AND HAVE ARGUED, THAT THEY
21 DO HAVE SUFFICIENT POLICIES AND PROCEDURES IN PLACE OR
22 THAT THEY DO NOT ACTUALLY HAVE A DUTY TO PROVIDE SUCH
23 CARE - CLAIMS WITH WHICH WE VEHEMENTLY DISAGREE - IN
24 THE TERMS OF THE MOTION FOR CLASS CERTIFICATION, THAT
25 IS A MERITS ARGUMENT. AND IT DOES NOT DEFEAT CLASS

1 CERTIFICATION.

2 THANK YOU, YOUR HONOR.

3 THE COURT: LET ME ASK YOU ONE OTHER QUESTION,
4 MR. BROWN, ALTHOUGH I DON'T KNOW THAT YOU SPECIFICALLY
5 ADDRESSED IT.

6 BUT IF SOMEBODY IS -- IF SOMEBODY IS --
7 GOING BACK TO THE GOVERNMENT'S POSITION AS TO TORT
8 CLAIMS. IF A PERSON IS INJURED BY AN ALLEGED TORT IN
9 AN AUTOMOBILE ACCIDENT OR SOME OTHER MANNER, THERE ARE
10 TIMES WHERE THAT INDIVIDUAL CAN BE TREATED BY MEDICAL
11 PERSONS WHO DO THE TREATMENT WITHOUT CHARGING, BUT HAVE
12 A LIEN THAT THEY ESTABLISH WITH RESPECT TO ANY RECOVERY
13 THAT THE PLAINTIFF MIGHT OBTAIN AT THE END OF THE
14 LITIGATION.

15 DOES THAT HAVE ANY APPLICATION HERE?

16 MR. BROWN: I'M NOT UNDERSTANDING HOW IT WOULD
17 APPLY AT ALL.

18 THE COURT: WELL, I UNDERSTAND THAT -- YOUR
19 POSITION IS, THIS IS AN INJUNCTIVE RELIEF. THE
20 GOVERNMENT'S POSITION IS, THAT IT'S TORT RELIEF. THERE
21 WAS A DISCUSSION EARLIER ABOUT, IF YOU HAD TO WAIT
22 UNTIL THE END OF THE FEDERAL TORT CLAIMS ACT FOR THE
23 TREATMENT THAT YOU NEEDED, IT WOULD BE TOO LATE.

24 SO MY QUESTION IS, WHAT I JUST STATED.
25 YOU COULD GET -- COULD YOU GET THE TREATMENT

1 IMMEDIATELY?

2 AND THE PERSON WHO PROVIDED IT, DOING IT
3 WITHOUT REQUIRING CASH OR PAYMENT, BUT INSTEAD HAVING A
4 LIEN?

5 MR. BROWN: I MEAN, I THINK THAT MISSTATES OUR
6 CASE AND OUR SITUATION. I THINK, HERE, THE GOVERNMENT
7 HAD A DUTY TO PROVIDE THIS CARE. AND THEY DID NOT
8 PROVIDE THAT DUTY.

9 THE COURT: OKAY. OKAY. ALL RIGHT. THANK
10 YOU, MR. BROWN.

11 IS THERE ANYTHING NEW YOU HAVE TO ADD,
12 MR. HEYSE?

13 MR. HEYSE: IF I MAY?

14 THE COURT: BRIEFLY.

15 MR. HEYSE: VERY BRIEFLY. I PROMISE.

16 JUST WITH RESPECT TO THE DE LA CRUZ
17 DECLARATION. THE INCONSISTENCY BETWEEN PARAGRAPH 11
18 WHERE HE DESCRIBES AN INDIVIDUAL THAT WAS, QUOTE,
19 "REPORTEDLY ABUSED BY A STRANGER IN HER HOME COUNTRY,"
20 AS COMPARED TO FOOTNOTE 1 TALKING ABOUT, THAT THE TVPRA
21 REQUIRES A HOME STUDY IN THE EVENT THE CHILD HAS BEEN A
22 VICTIM OF PHYSICAL OR SEXUAL ABUSE. THAT SPEAKS
23 CONCLUSIVELY THAT THE CHILD HAS INDEED BEEN A VICTIM.

24 PARAGRAPH 11 DESCRIBES "REPORTEDLY
25 ABUSED." SO IT'S A SUGGESTION THAT THERE WAS ABUSE.

1 THAT FOOTNOTE ALSO DESCRIBES HOW IT'S
2 "THE TOTALITY OF THE CIRCUMSTANCES." IT'S THE
3 EVALUATION OF EVERYTHING. AGAIN, IT SPEAKS TO WHAT
4 TYPE OF REVIEW O.R.R. ENGAGES IN WHEN IT COMES TO
5 HANDLING THESE INDIVIDUALS AND WHAT KIND OF CARE
6 THEY'RE GIVEN AND WHAT KIND OF SERVICES ARE PROVIDED TO
7 THEM.

8 THE REVIEW WAS ON CONDUCTED. AND IT
9 WAS -- WHAT HIS STATEMENT IS STATING IS THAT A HOME
10 STUDY WAS NOT REQUIRED FOR THIS INDIVIDUAL.

11 OTHERWISE, WE STAND BY OUR PRIOR
12 ARGUMENTS.

13 THE COURT: JUST A MINUTE.

14 HAVE YOU HAD ANY -- HAVE THERE BEEN ANY
15 DISCUSSIONS ABOUT TRYING INFORMALLY TO RESOLVE THIS
16 MATTER?

17 I'M NOT ASKING FOR THE SUBSTANCE OF THOSE
18 DISCUSSIONS. JUST HAVE THERE BEEN ANY?

19 MR. HEYSE: DURING OUR JOINT STATUS REPORT --
20 OUR JOINT REPORT CONFERENCE, WE AGREED THAT SETTLEMENT
21 DISCUSSIONS AT THIS TIME WERE INAPPROPRIATE -- OR
22 PREMATURE.

23 THE COURT: DO YOU AGREE WITH THAT,
24 MS. LALLY?

25 MS. LALLY: YOUR HONOR, I DID PARTICIPATE IN

1 THE RULE 26 CONFERENCE WITH MR. HEYSE.

2 MY RECOLLECTION IS THAT WE AGREED THAT,
3 AFTER THE COURT'S RULING ON THESE MOTIONS WOULD BE A
4 VERY OPPORTUNE TIME TO HAVE THAT -- THOSE NEGOTIATIONS.

5 THE COURT: ALL RIGHT.

6 MR. HEYSE: I AGREE WITH THAT.

7 THE COURT: ALL RIGHT. THE REASON THAT I ASK
8 IS, THERE WAS SOMETHING, I BELIEVE, MR. HEYSE, YOU SAID
9 DURING THE HEARING TODAY, WHICH IS, WITH RESPECT TO THE
10 MENTAL HEALTHCARE FOR THOSE WHO ARE NO LONGER DETAINED,
11 I THINK YOUR WORDS WERE TO THE EFFECT, QUOTE,
12 "RESOURCES ARE OUT THERE," CLOSED QUOTE. AND I THINK
13 YOU WERE REFERRING TO SOME PRO BONO AND OTHER
14 OPPORTUNITIES. RIGHT?

15 MR. HEYSE: YES, YOUR HONOR.

16 THE COURT: AND I THINK YOU HAVE ALSO STATED
17 THAT -- INCLUDING WITH THE PINK SLIP THAT WAS SUBMITTED
18 TODAY, ABOUT WHICH, AGAIN, I HAVE NO EVIDENCE. BUT
19 THAT SCREENING IN SOME MANNER IS DONE. AND YOU THINK
20 WHAT'S BEING DONE IS ADEQUATE TO IDENTIFY WHAT SERVICES
21 ARE NEEDED. SO I KNOW THERE'S A DISAGREEMENT ON THE
22 ADEQUACY OF THE SCREENING. AND THERE MAY BE -- THERE'S
23 A DISAGREEMENT ON THE NATURE OF THE SERVICES THAT ARE
24 BEING PROVIDED. BUT IF THERE'S A MEANS OF SCREENING
25 AND THERE'S RESOURCES OUT THERE, THERE SEEMS TO BE A

1 PATH WHERE YOU MIGHT BE ABLE TO RESOLVE SOME OR ALL OF
2 THIS.

3 MR. HEYSE: AS TO THE INDIVIDUALS THAT ARE
4 DETAINED, IF THEY NEED MORE SCREENING, THAT'S CERTAINLY
5 SOMETHING THE GOVERNMENT WOULD SAY IS ITS DUTY TO
6 PROVIDE ADEQUATE CARE. IF THE COURT DECIDES THAT'S
7 PART OF THAT DUTY, THEN, YES.

8 AS TO INDIVIDUALS THAT HAVE BEEN RELEASED
9 ALREADY, AGAIN, WAKEFIELD LIMITS --

10 THE COURT: NO, I UNDERSTAND THE LEGAL
11 ARGUMENTS HERE. I'M NOT ASKING YOU TO -- I'M ASKING
12 FOR YOU TO CONSIDER THESE THINGS AS YOU PROCEED WITH
13 YOUR POTENTIAL DISCUSSIONS TO EITHER RESOLVE THE MATTER
14 OR NARROW THE DISPUTES.

15 MR. HEYSE: YES, CERTAINLY OPEN TO SUCH IDEAS.
16 AGAIN, IT'S A MATTER OF RESOURCES AVAILABLE TO THE
17 AGENCY, FUNDING, THINGS OF THAT NATURE.

18 THE COURT: WITH RESPECT TO DATES IN THIS
19 MATTER, I THINK IT WOULD BE MORE PRODUCTIVE FOR ME TO
20 GET THROUGH THESE TWO MOTIONS BEFORE SETTING DATES.

21 I RECOGNIZE YOU HAVE ASKED FOR AN
22 ACCELERATED DATE ON THE MOTION TO DISMISS. I THINK
23 I'LL BE IN A BETTER POSITION TO EVALUATE DATES WHEN I
24 GET THESE THROUGH THESE TWO MOTIONS.

25 MR. HEYSE: OKAY.

1 MR. FEE: THANK YOU, YOUR HONOR.

2 MR. HEYSE: CLARIFICATION ON THE EX PARTE
3 MOTION? THAT'S NOT BEEN DENIED. IT'S JUST A DECISION
4 ON IT HAS BEEN DEFERRED?

5 THE COURT: CORRECT.

6 MR. HEYSE: OKAY.

7 THE COURT: THANK YOU FOR YOUR HELP TODAY.

8 MR. HEYSE: THANK YOU, YOUR HONOR.

9 MR. FEE: THANK YOU, YOUR HONOR.

10 (END OF PROCEEDINGS)

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